Supreme Court of the United States

October Term, 1920.

No. 30 Orig.

IN THE MATTER

OF

MATTHEW ADDY STEAMSHIP & COMMERCE CORPORATION, a Delaware Corporation.

PETITION FOR A WRIT OF MANDAMUS.

NELSON B. CRAMER,
T. K. SCHMUCK,
Attorneys for the Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. , Original.

IN THE MATTER OF MATTHEW ADDY STEAMSHIP & COMMERCE CORPORATION, A DELAWARE CORPORATION, PETITIONER.

MOTION FOR LEAVE TO FILE PETITION FOR MANDAMUS.

Comes here now Matthew Addy Steamship & Commerce Corporation, a Delaware corporation, by its attorneys, and moves the court for leave to file a petition for writ of mandamus directed to the Honorable Edmund Waddill, judge of the District Court of the United States, which petition is annexed hereto.

NELSON B. CRAMER,
T. K. SCHMUCK,
Attorneys for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES OF AMERICA.

October Term 1920.

In the Matter *of* Matthew Addy Steamship & Commerce Corporation, a Delaware Corporation, Petitioner.	No.

Petition for a Writ of Mandamus.

—o—

To the Honorable the Justice of the Supreme Court of the United States of America:

Your Petitioner, Matthew Addy Steamship & Commerce Corporation, a Delaware Corporation, by its attorneys, Nelson B. Cramer and T. K. Schmuck, respectfully shows to this Honorable Court that on September 21st, 1920, Coalmont Moshannon Coal Company, a Pennsylvania Corporation, filed its petition (exhibit "A") in the Circuit Court of the City of Norfolk, State of Virginia, against your petitioner for recovery of damages for alleged breach of contract in the sum of Three Hundred and Fifty Thousand Dollars ($350,000.00) together with interest thereon and costs, and praying for the attachment of the petitioner's property in the hands of various third persons, codefendants therein, which suit

and attachment were authorized by the provisions of Chapter 269 of the Code of Virginia, and more particularly by Sections 6378, 6379, 6380, and 6382 thereof relating to the persons who may sue out attachments, the grounds thereof, jurisdiction, practice and pleading (Exhibit "B").

Thereafter, on the 21st and 22d days of September, 1920, attachments, as prayed for in said petition, having been issued, were levied against your petitioner's property.

Thereafter and prior to the time when your petitioner was required to answer or plead to the petition of said Coalmont Moshannon Coal Company, your petitioner duly complied in all respects with the provisions of Chapter 3 of the Judicial Code of the United States and removed said case into the District Court of the United States for the Eastern District of Virginia on the ground of diversity of citizenship, said District Court being the Court for the district wherein such suit was pending; such removal being authorized by Sections 28 and 29 of the Judicial Code of the United States. A copy of the petition for such removal is hereto annexed (Exhibit "C");

Thereafter, said Coalmont Moshannon Coal Company, by its attorneys, made oral motion in said District Court of the United States for the Eastern District of Virginia that said suit be remanded to the Circuit Court of the City of Norfolk, State of Virginia; and after due consideration, the Honorable Edmund Waddill, Judge of the said District Court of the United States for the Eastern District of Virginia, on January 8th, 1921, granted said motion; copies of the opinion of said Judge and order to remand being hereto annexed (Exhibits "D" and "E").

Your petitioner further states that the action of said Honorable Edmund Waddill, Judge of said District Court of the United States for the Eastern District of Virginia, in ordering said case remanded, is contrary to law

and oppressive to your petitioner; and that your petitioner has no remedy save in the present application to this Court:

Your petitioner further shows that it is essential to the uniform administration of justice in the Courts of the United States that this Honorable Court grant a Writ of Mandamus as hereafter prayed and hear and determine the question to be presented thereby (viz: as to the right of removal in cases of suits between citizens of different states brought in the courts of a state of which neither party is a resident), inasmuch as various judges of United States District Courts entertain and enforce conflicting opinions as to the right to remove such suits to the United States District Courts. Such cases are removable as a matter of right to the District Courts of the United States for the Eastern District of Kentucky: (Louisville & N. RR. Co. *v.* Western Union Tel. Co., 218 Fed. 91); to the District Courts of the United States for the Northern District of Georgia (Sanders *v.* Western Union Telegraph Co., 261 Fed. 697); to the District Courts of the United States for the Southern District of Alabama (Earles *v.* Germain Company, 265 Fed. 715, M. Hohenberg & Co. *v.* Mobile Liners, Inc., 245 Fed. 169); to the District Courts of the United States for the Northern District of Texas (James *v.* Amarillo City, Light & Water Co., 251 Fed. 337).

Such cases are not removable in the Southern District of Texas; (Pendar *v.* Empire Gas & Fuel Co., 260 Fed. 669); in the Southern District of New York (Doherty et al *v.* Smith, 233 Fed. 132); in the District of Maryland (Mutual Life Ins. Co. of New York *v.* Painter et al., 220 Fed. 998); or in the Eastern District of Virginia (see Exhibit "D").

In the Northern District of New York, the learned Judge for such District has held, contrary to both lines of authority above cited, that such cause is removable but is removable to the district of the defendant's residence regardless of where it may have been pending

(Park Square Automobile Station *v.* American Locom. Co., 222 Fed. 979).

The conflicting rulings of the district Courts heretofore referred to have arisen from diverse interpretations of the decision of this Honorable Court in Exparte Wisner, 203 U. S. 449, as modified by In Re Moore, 209 U. S. 490, Western Loan & Savings Co. *v.* Butte & Boston Consolidated Mining Company, 210 U. S. 368; Matter of Tobin, Petitioner, 214 U. S. 506; and Exparte Nicola, 218 U. S. 668.

Your petitioner further states it believes that the correct rules and principles applicable to removal under such circumstances and therefore to said case brought against it by said Coalmont Moshannon Coal Company, are those set forth in the opinion by the Honorable A. M. J. Cochran in the case of L. & N. Rr. Co. *v.* Western Union Telegraph Co., 218 Fed. 91, and that said case brought against it by said Coalmont Moshannon Coal Company and similar cases are removable as a matter of right to the United States Court for the district where such suits are pending; however, under the present confused state of the law, one rule is applicable to suitors in one jurisdiction and a different rule is applicable in other jurisdictions, all to the injury and oppression and confusion of your petitioner and other suitors; and that in consequence, your petitioner and diverse other suitors are deprived of privileges to which they are entitled in common with other citizens of the several states and of the United States as provided by the constitution of the United States.

Wherefore, your petitioner prays that this Honorable Court may issue a writ of Mandamus in due form to the Honorable Edmund Waddill, Judge of the United States Court for the Eastern District of Virginia to vacate said order made by him on the 8th day of January, 1921, to remand the cause heretofore referred to,

viz.: Coalmont Moshannon Coal Company, Plaintiff *vs.* Matthew Addy Steamship & Commerce Corporation, Inc., Principal defendant, et als., and to have said cause of action redocketed in said United States Court for the Eastern District of Virginia and to hear and determine said cause according to law, or on failure so to do, that he show cause to this Court on a day to be named in said writ why said order should not be vacated and why said cause should not be redocketed, and why he should not hear and determine said cause according to law.

Nelson B. Cramer and T. K. Schmuck,
Attorneys for Matthew Addy Steamship &
Commerce Corporation, Inc., Petitioner.

State of New York,
County of New York, } ss.:

I, Thomas K. Schmuck, am one of the attorneys for the petitioner herein and am familiar with all of the facts stated in said petition. The statements therein made are true to the best of my knowledge and belief.

Thomas K. Schmuck

Sworn and Subscribed to before
me this 20 day of January, 1921.

S. Arnston

Notary Public.

Exhibit A.

VIRGINIA

IN THE

CIRCUIT COURT FOR THE CITY OF NORFOLK.

COALMONT MOSHANNON COAL COMPANY, a corporation,

vs.

MATTHEW ADDY STEAMSHIP AND COMMERCE CORPORATION, INC., a corporation, Principal Defendant,

and

JOHN BARTON PAYNE, Director General of Railroads, operating the following railroads:

NORFOLK AND WESTERN RAILWAY COMPANY, CHESAPEAKE AND OHIO RAILWAY COMPANY, and VIRGINIAN RAILWAY COMPANY;

LAMBERTS POINT COAL EXCHANGE, SEWELLS POINT COAL EXCHANGE, INC., a corporation, THE NEWPORT NEWS COAL EXCHANGE, INC., a corporation—Co-defendants.

The petition of Coalmont Moshannon Coal Company, respectfully shows:

(1) That it is a corporation duly chartered and existing with its principal office and place of business in the City of Philadelphia, in the State of Pennsylvania.

(2) That the principal defendant, the Matthew Addy Steamship and Commerce Corporation, is a corporation duly chartered and existing with its principal office and place of business in the City of New York, State of New York, and is a foreign corporation, having estate and debts owing to it within the City of Norfolk, Virginia.

(3) That heretofore, to-wit: on the 20th day of January, 1920, the said principal defendant entered into a contract with your petitioner whereby it agreed to sell, and did sell to your petitioner sixty thousand (60,000) gross tons R. O. M. Virginia City coal, at the price of Six ($6.00) dollars per ton, FOB piers, Norfolk, Virginia, to be delivered at the rate of Five Thousand (5,000) tons per month, during the year 1920, payment to be cash against documents.

(4) That thereafter, the said principal defendant refused and declined to deliver said coal to your petitioner pursuant to said contract, although often requested so to do. That by reason of said breach of contract as aforesaid, your petitioner has suffered damages on account of said breach for a large amount, to wit, the sum of Three hundred fifty thousand ($350,000.00) dollars.

(5) That the co-defendants, to-wit: John Barton Payne, Director General of Railroads, operating the following railroads: Norfolk and Western Railway Company, Chesapeake and Ohio Railway Company and Virginian Railway Company; and the Lamberts Point Coal Exchange, Sewells Point Coal Exchange, Inc., a corporation, and The Newport News Coal Exchange, Inc., a corporation, have property or monies in their possession or under their control belonging to said principal defendant.

Wherefore your petitioner prays that an attachment be issued against the property of the principal defendant,

located in the City of Norfolk, Virginia, and against the property or monies of the principal defendant in the possession of or under the control of the co-defendants for the sum of Three hundred fifty thousand ($350,000.00) dollars, which, at least, your petitioner ought to recover from the said principal defendant.

And your petitioner will ever pray, etc.

COALMONT MOSHANNON COAL COMPANY

By /s/ Swink & Fentress
It's Agent and Attorney.

STATE OF VIRGINIA

CORPORATION OF THE CITY OF NORFOLK, TO-WIT.

G. R. Swink, being duly sworn, says that he is the Agent of and Attorney for the Coalmont Moshannon Coal Company, the petitioner above named, and is authorized to make this affidavit; that he has read the foregoing petition and knows the contents thereof; that the same are true of his own knowledge, except as to matters therein stated on information and belief and as to them, he believes it to be true; that the petitioner ought to recover, at least, the sum of Three hundred fifty thousand ($350,000.00) dollars damages, by reason of the breach of the contract set out in said petition.

G. R. SWINK.

Sworn to and subscribed before me this the 21st day of September, 1920.

WILLIS V. FENTRESS,
Notary Public in and for the Corporation of the City of Norfolk, State of Virginia.

Exhibit B.

CODE OF VIRGINIA

6378. Who may sue out an attachment—

If any person have a claim, legal or equitable, to any specific personal property, or a like claim to any debt, whether such debt be due and payable or not, or to damages for breach of any contract, express or implied, or to damages for a wrong, and such claim exceed twenty dollars, exclusive of interest, he may sue out an attachment therefor on any one or more of the grounds stated in the following section, except that if the claim be for a debt not due and payable, no attachment shall be sued out, where the only ground for the attachment is that the defendant or one of the defendants against whom the claim is, is a foreign corporation, or is not a resident of this State and has estate or debts owing to the said defendant within this State.

6379. Grounds of attachment.

The following shall be sufficient grounds for an attachment. That the principal defendant or one of the principal defendants:

First. Is a foreign corporation, or is not a resident of this State, and has estate or debts owing to said defendant within the county or city in which the attachment is, or that said defendant being a non-resident of this State, is entitled to the benefit of any lien, legal or equitable, on property, real or personal, within the county or city in which the attachment is. The word "estate", as herein used, shall include all rights or interests of a pecuniary nature which can be protected, enforced, or proceeded against in courts of law or equity; or,

SECOND.—It removing or is about to remove out of this State with intent to change his domicile; or,

THIRD.—That the said debtor intends to remove, or is removing, or has removed the specific property sued for, or his own estate, or the proceeds of the sale of his property, or a material part of such estate or proceeds, out of this State, so that there will probably not be therein effects of such debtor sufficient to satisfy the claim when judgment is obtained therefor, should only the ordinary proceeds of law be used to obtain the judgment.

FOURTH.—Is converting, or is about to convert, or has converted his property of whatever kind, or some part thereof, into money, securities, or evidences of debt, with intent to hinder, delay, or defraud his creditors; or,

FIFTH.—Has assigned or disposed of, or is about to assign or dispose of his estate, or some part thereof, with intent to hinder, delay, or defraud his creditors; or,

SIXTH.—Has absconded, or is about to abscond from the State, or has concealed himself therein to the injury of his creditors, or is a fugitive from justice.

The intent mentioned in clauses four and five above may be stated either in the alternative or conjunctive.

6380. Courts having jurisdiction of attachment; practice and procedure therein.—

The jurisdiction of attachments under this chapter shall be in the circuit courts of the counties and in the circuit and such city courts of the cities as have civil jurisdiction in common law cases, and the practice and procedure, except as otherwise provided, shall be the same, as near as may be, as in personal actions.

6382. Pleadings in attachment.—

No pleading on behalf of the plaintiff shall be necessary except the petition mentioned in the following section. The principal defendant, and any other defendant who seeks to defeat the petitioner's attachment, may demur to the petition, issue on which demurrer shall be deemed to be joined, but if the demurrer be overruled, he shall answer the same or state his grounds of defense in writing, to neither of which shall any replication be necessary, but the cause shall be deemed to be at issue on the answer or the grounds stated. The answer or grounds of defense shall be sworn to by such defendant, or his agent. Any other defendant may answer or state the grounds of his defense to the petition, under oath, and the cause shall be deemed at issue as to him, if he denies any of the allegations of the petition, without any replication. Answers under this section shall not have the effect of evidence for the defendant.

Exhibit C.

VIRGINIA

IN THE

CIRCUIT COURT FOR THE CITY OF NORFOLK.

COALMONT MOSHANNON COAL COMPANY, a corporation,

vs.

MATTHEW ADDY STEAMSHIP AND COMMERCE CORPORATION, INC., a corporation,
Principal Defendant,

and

JOHN BARTON PAYNE, Director General of Railroads, operating the following railroads:

Norfolk and Western Railway Company, Chesapeake and Ohio Railway Company, and Virginia Railway Company;

Lamberts Point Coal Exchange, Sewells Point Coal Exchange, Inc., a corporation, The Newport News Coal Exchange, Inc., a corporation,
Co-defendants.

Petition for Removal

The defendant, Matthew Addy Steamship and Commerce Corporation makes and files this petition and says:

(1) That the above entitled cause is a suit of a civil nature at law wherein Coalmont Moshannon Coal Company seeks to recover damages from this defendant for alleged breach of an alleged contract and by reason of the fact that this defendant is a foreign corporation, to attach property or monies belonging to this defendant in the possession or control of the other parties defendant herein;

(2) That the matter in controversy exceeds exclusive of interest and costs the sum or value of Three thousand dollars ($3,000.00); that is, Coalmont Moshannon Coal Company seeks herein to recover from this defendant, by reason of its alleged breach of an alleged contract, the sum of Three hundred and fifty thousand dollars ($350,000.00), together with interest thereon and costs.

(3) That such matters set forth in the foregoing paragraphs relating to said alleged breach of contract is a controversy wholly between Coalmont Moshannon Coal Company and this defendant.

(4) That this defendant is a corporation organized and existing under the laws of the State of Delaware and is not, now, was not at the commencement of this suit and has never been a citizen of the State of Virginia, but was at the time of the commencement of this suit, is now and has at all times been a citizen of the State of Delaware.

(5) That Coalmont Moshannon Coal Company is a corporation organized and existing under the laws of the State of Pennsylvania and was at the time when this suit was filed and has been at all times since and is now a citizen of the State of Pennsylvania.

(6) That this petition is made and filed in the Circuit Court for the City of Norfolk, State of Virginia, before this defendant is required by the laws of the State of Virginia or the rules of said Court to answer or plead to the declaration or complaint of said Coalmont Moshannon Coal Company.

(7) That this defendant has made and filed herewith a bond with good and sufficient surety for this de-

fendant entering its appearance in the District Court of the United States in and for the Eastern District of Virginia, within thirty (30) days from the date of this petition, a certified copy of the record of this suit and for paying all costs that may be awarded by the said District Court of the United States if the said District Court shall hold that such was wrongfully or improperly removed thereto.

(8) That written notice of this petition and bond for removal before filing has been given plaintiff, as required by statute.

Wherefore, this defendant petitions for the removal of this suit into the District Court of the United States to be held in and for the Eastern District of Virginia and prays that the bond filed herewith shall be approved by this Court and for all other and proper relief.

MATTHEW ADDY STEAMSHIP AND COMMERCE CORPORATION,
By CRAMER AND SCHMUCK,
Its Agent and Attorneys.

STATE OF VIRGINIA,

CORPORATION OF THE CITY OF NORFOLK, to-wit:

THOMAS K. SCHMUCK, being duly sworn, says that he is a member of the firm of Cramer and Schmuck, is agent for and one of the attorneys for Matthew Addy Steamship and Commerce Corporation, the defendant above mentioned, and has authority to make this affidavit, that he has read the foregoing petition and knows the contents thereof, that the same are true to his own knowledge.

THOMAS K. SCHMUCK.

Sworn to and subscribed before me this 25th day of September, 1920.

JOHN A. BEACHER,
Notary Public in and for
the Corporation of the
City of Norfolk,
State of Virginia.

Exhibit D.

IN THE

DISTRICT COURT OF THE UNITED STATES

For the Eastern District of Virginia.

Coalmont Moshannon Coal Co.,
Petitioner,

vs.

Matthew Addy Steamship & Commerce Corporation, Inc.,
Principal Defendant,

and

John Barton Payne, Director General operating certain railroads, namely, Norfolk & Western, Chesapeake & Ohio and Virginian,

and the

Lambert's Point Coal Exchange, and the Sewell's Point Coal Exchange,
Co-defendants,

in whose possession property alleged to belong to the principal defendant, is sought to be attached.

On Motion to Remand to State Court.

Messrs. Swink & Fentress of Norfolk, Va., for petitioners;

Messrs. Cramer & Schmuck of New York, for principal defendant and co-defendant.

WADDILL, District Judge:—

The above named petitioner duly instituted its attachment proceeding under a recent statute of the State of Virginia, Code 1919, sec. 6383, in the circuit court of Norfolk city and caused to be sued out of said court certain attachments against property alleged to belong to the principal defendant, in the hands of the co-defendant, the railroads and coal exchanges aforesaid, which attachments were properly served as required by the law of the State of Virginia. Both the petitioner and the principal defendant are non-resident corporations of the State of Virginia, the petitioner having its principal office in the city of Philadelphia, and the principal defendant, its principal office in the city of New York. Upon service of the attachment as aforesaid, the principal defendant, by appropriate proceeding, filed in the State court its petition praying the removal of the proceeding into the United States District Court for the Eastern District of Virginia, and the same was by the State court, removed into this court. Thereupon, the petitioner appeared specially in this court, and moved to remand the case to the State court, from whence it had been removed, the grounds alleged therefor being especially that inasmuch as both the petitioner and principal defendant were non-residents of the Eastern District of Virginia, assuming the case to be one which might have been originally brought in the federal court, that the same could not be so removed, save with the consent of the petitioner, which consent that petitioner declined to give, and, on the contrary, asserted its right to have the proceeding remain in the State court.

Section 24, 28, 29, and 51 of the Judicial Code, 36 Stat. L. 1087, regulate and control the jurisdiction of the United States District Courts in suits like the one at bar. Sections 24 and 51 deal with original jurisdiction. The former defines the character of suits, and

the latter indicate the districts in which they may be brought. Section 28 authorizes removal to the district court "for the proper district", of suits brought in the State court, and which could have originally been brought in the United States district court. Section 29 provides for the removal of such suits "into the district court to be held in the district in which such suit is pending."

Much confusion has arisen in the interpretation of the removal statutes, especially in construing that part of the act which in effect, limits the jurisdiction of the federal court to such cases as might have been originally brought in the federal court; the beclouding of the question arising chiefly from confounding venue with jurisdiction—venue being something which could be waived by the parties, whereas jurisdiction could not be. In an ordinary civil action instituted in a circuit court to recover judgment on a claim like the one in suit, it is conceded that the federal court of the district would have jurisdiction of such case, if instituted in a federal court, upon the defendant appearing therein, and hence that the same was a suit of which that court would have had original jurisdiction, such as is contemplated by the removal statute, upon timely and appropriately asking for removal; but the petitioner insists that while this is true of such a case if brought within the district of the plaintiff's residence, that still, where brought, as here, in a district in which neither the plaintiff nor the defendant resides, that the petitioner's right of removal is limited, and cannot be had without the petitioner's assent thereto. This is the sole question to be determined in this case. If the petitioner is right in his contention, its motion to remand should be granted; otherwise, the same should be overruled.

In Hughes Fed. Pro. 2nd ed. c. 15, sec. 115, p. 321, the author says: "As to suits brought in a state court in a district where neither plaintiff nor defendant resided, the earlier decisions preponderated in favor of the doc-

trine that the defendant could remove such a case, on the theory that the defendant alone was interested in the place of suit; but later cases have established the doctrine that such a case is not removable by defendant without the consent or waiver of the question by plaintiff;" and cites in support of his position In re Wisner, 203 U. S., 449; In re Moore 209, U. S. 490; Exparte Harding, 219 U. S. 363; Puget Sound Sheet Metal Works *v.* Great Northern RR 195 Fed. 350. Other and more recent decisions, apparently take the same view as those cited, of which the following may be referred to: Doherty *v.* Smith, 233 Fed. 132; Pender *v.* Empire Gas & Fuel Co., 260 Fed. 669; Isaac Kubie Co. *v.* Lehigh Valley RR Co., 261 Fed. 806; Kansas City Gas & Electric Co. *v.* Wichita Natural Gas Co., (CCA 8th circuit) 266 Fed. 614; Exparte Park Square Automobile Co., 244 U. S. 412. See also Hall *v.* Great Northern RR Co., 197 Fed. 488, and Jackson *v.* Kenefick, 233 Fed. 130. The last two cases, while dealing with the general subject, involve also the right of an alien to remove. Also, George *v.* Tennessee Coal & Iron Co., 184 Fed. 951, a decision of Judge Newman, of Georgia, which involved a removal in an attachment case.

These decisions generally sustain the plaintiff's right to remand, and while, covering the same period as these, there have been several cases taking the contrary view, citation of them will not be made, further than to refer to the case of Louisville & Nashville RR *v.* Western Union Telegraph Co., 218 Fed. 91, an opinion of Judge Cochran, of Kentucky, which contains an exceedingly able and forceful discussion of the subject, the reasoning of which is hard to successfully answer. Much confusion of thought on the question has arisen since, and apparently, as a result of the decision in In re Wisner, 203 U. S. 449, where the supreme court held that a suit instituted in a State court between a nonresident plaintiff, and a nonresident defendant, could not be removed into the federal

court, certainly without the consent of the plaintiff; and likewise, the court held that the remedy by mandamus, was the proper one to effect the remanding of the case. In re Moore, 209 U. S. 490, apparently modified the Wisner case, insofar as it held that the defendant could not waive the right to be sued by a nonresident plaintiff, in a particular district, concerning a matter of which the court had jurisdiction; but the Moore case was unlike the Wisner case, in that the plaintiff there waived his right to object to the removal, by appearing in the federal court. In Exparte Harding, 219 U. S. 263, the supreme court reviewed the Wisner case at great length, as it did also in Exparte Park Square Automobile Co., 244 U. S. 412; but in both of these decisions, the court dealt mainly with the portion of the Wisner case that held that mandamus was the proper remedy in case of a federal court's refusal to remand, and modified the case in that respect. But in neither of these cases, nor in the Moore case, was there any disapproval of that portion of the Wisner case which held, in effect, that there could be no removal from a state to a federal court, where both plaintiff and defendant were non-residents of the state in which the suit was instituted, save with the plaintiff's consent.

However much force there may be in the reasoning in favor of the defendant's right of removal, under circumstances like the present, and there is confessedly much strength in the contention, as to deny the right of removal to a defendant in all cases in which his property may be attached in a foreign jurisdiction, save where the taking happens to be in suit brought in the district of the residence of the plaintiff, seems incongruous, and in derogation of his right of removal, and might operate greatly to his prejudice in the local courts of a community hostile to him, which, however, has no application here, as every right to which the defendant is entitled, will be as safely assured to him in the State court, as in this

court, still, the court does not feel, in the light of this weight of authority, that it should be affected by any preconceived views it may have on the subject, particularly as the supreme court has three times reviewed at considerable length, the Wisner case, and expressed no dissent to the portion thereof which would deny the right of removal in this case. The court is further influenced in its action by the fact that this proceeding is a somewhat novel one, in that it is a simple attachment instituted under a new Virginia statute, not an attachment sued out in and as incident to a suit, as heretofore prevailing in the commonwealth, but a legal proceeding consisting only of the attachment, and since original jurisdiction cannot be acquired by attachment in the federal court, (Hughes, Fed. Pro. 2nd. ed. sec. 106, p. 275, Big Vein Coal Co. *vs.* Read, 229 U. S. 31), the character of this proceeding may give force to the suggestion that the same in no event could have been inaugurated in the federal court, and hence it can not be removed thereto.

The motion to remand will be granted.

Exhibit E.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF VIRGINIA

Coalmont Moshannon Coal Company, a corporation,

vs.

Matthew Addy Steamship and Commerce Corporation, a corporation,
Principal Defendant, *et als.*

This cause coming on to be heard, upon the special appearance of the Coalmont Moshannon Coal Company and its motion to remand this proceeding to the Circuit Court for the City of Norfolk, Virginia, and being argued by Counsel:

IT APPEARING, for the reasons stated in a written opinion filed herein, on January 1, 1921, that this case was improperly removed to this Court:

IT IS ORDERED, that said proceeding be remanded to the Circuit Court for the City of Norfolk, Virginia, and that the said plaintiff, Coalmont Moshannon Coal Company, do recover of the principal defendant, Matthew Addy Steamship and Commerce Corporation, its costs in this behalf.

January 7, 1921.

EDMUND WADDILL,
U. S. Judge.

IN THE

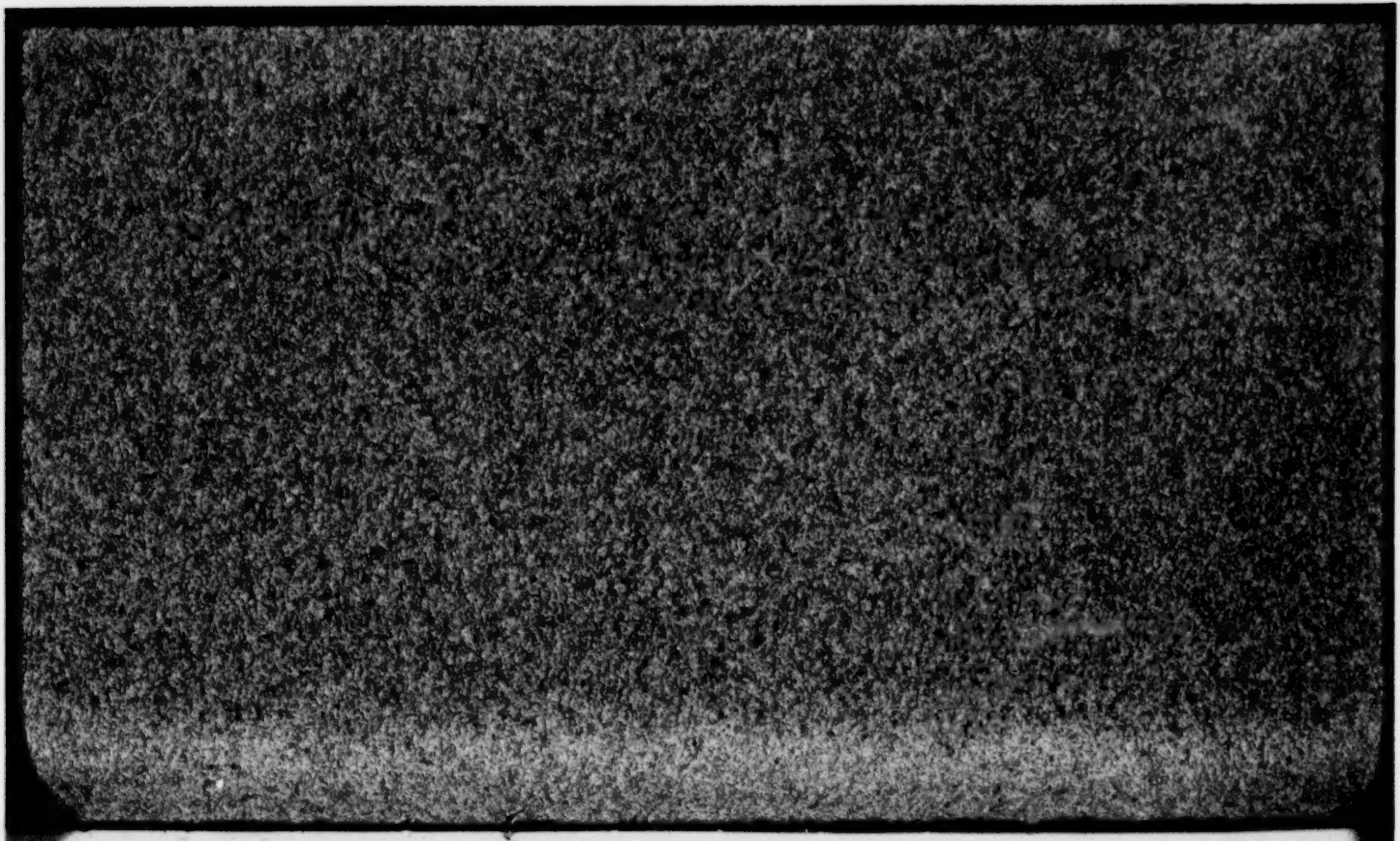
SUPREME COURT OF THE UNITED STATES

No. 30, Original.

IN RE MATTHEW ADDY STEAMSHIP & COMMERCE CORPORATION, A DELAWARE CORPORATION, PETITIONER.

PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

MATTHEW ADDY STEAMSHIP & COMMERCE CORPORATION,
BY NELSON B. CRAMER,
THOMAS E. SCHMUCK,
Counsel.



IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 30, Original.

IN RE MATTHEW ADDY STEAMSHIP & COMMERCE CORPORATION, A DELAWARE CORPORATION, PETITIONER.

PETITION FOR WRIT OF INJUNCTION OR PROHIBITION.

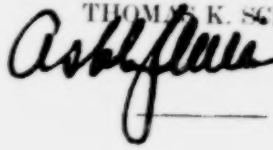
Your petitioner, Matthew Addy Steamship & Commerce Corporation, a Delaware corporation, says that this honorable court has, at your petitioner's prayer, heretofore issued herein a Rule, directed to the Honorable Edmund Waddill, Jr., judge of the District Court of the United States for the Eastern District of Virginia, to show cause, by March 14, 1921, why a writ of mandamus should not be issued from this honorable court addressed to him, directing that a certain order made by him on January 8, 1921, remanding to the Circuit Court of the city of Norfolk, Virginia, the case of Coalmont Moshannon Coal Company, plaintiff, *vs.* Mat-

thew Addy Steamship & Commerce Corporation, Inc., principal defendant, be vacated and annulled and the said cause redocketed in the said United States District Court for the Eastern District of Virginia, and be there heard and determined according to law.

Your petitioner says further that although said Coalmont Moshannon Coal Company, the plaintiff in the cause above mentioned, and the Honorable Allan Hanckel, judge of the said Circuit Court of the city of Norfolk, Virginia, have been duly informed and are aware of the action of this honorable court as above set out, nevertheless the said Coalmont Moshannon Coal Company, which is a Pennsylvania corporation, having its principal place of business in the city of Philadelphia, Pennsylvania, threatens to, and will, unless restrained by the order of this court, proceed to prosecute said cause in the said Circuit Court of the city of Norfolk, Virginia, and the said Honorable Allan Hanckel, judge of the said Circuit Court of the city of Norfolk, Virginia, threatens to, and will, unless restrained by this honorable court, proceed to hear and determine said suit, all in violation of law and to the injury and detriment of your petitioner.

Wherefore, your petitioner prays that this court issue a writ of injunction, or a temporary restraining order, enjoining said Coalmont Moshannon Coal Company from proceeding further in the prosecution of said cause, and restraining the Honorable Allan Hanckel, judge of said Circuit Court of the city of Norfolk, Virginia, from hearing and determining the same, until after a determination of this proceeding by this court; or, in the alternative, that this court issue a writ of prohibition directing the said Honorable Allan

Hanckel, judge of the Circuit Court of the city of Norfolk, Virginia, as aforesaid, prohibiting him from proceeding to hear and determine said cause until after determination of this proceeding by this court; and for all other proper relief.

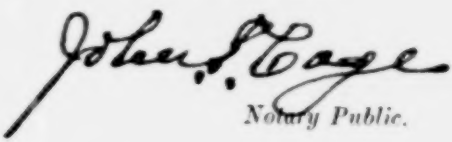
MATTHEW ADDY STEAMSHIP & COMMERCE CORPORATION,
By NELSON B. CRAMER,
THOMAS K. SCHMUCK,

Counsel.

DISTRICT OF COLUMBIA, *To wit:*

This day personally appeared before me, John P. Cage, a notary public in and for the District of Columbia, Ashby Williams, who subscribed the foregoing petition and made oath before me in my district aforesaid that the matters and facts set forth in the same are true and correct to the best of his knowledge and belief.

Given under my hand this 8th day of March, 1921.

My commission expires the 8th day of June, 1922.


Notary Public.

No. 30, Original

IN THE

Supreme Court of the United States.

October Term, 1920.

IN THE MATTER

OF

MATTHEW ADDY STEAMSHIP AND COMMERCE CORPORATION, a Delaware Corporation,

Petitioner.

Petitioner's Brief in Support of Rule.

NELSON B. CRAMER,
T. K. SCHMUCK,
Attorneys for Petitioner.

C. G. BURGOYNE PRINTING BUSINESS, 123 LIBERTY ST., NEW YORK.

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IN THE

Supreme Court of the United States,

October Term, 1920.

IN THE MATTER *of* MATTHEW ADDY STEAMSHIP & COMMERCE CORPORATION, a Delaware Corporation, Petitioner.	No. 30 Original

PETITIONER'S BRIEF IN SUPPORT OF RULE.

Statement.

Coalmont Moshannon Coal Company, a Pennsylvania corporation, filed suit on September 21, 1920, in the Circuit Court of the City of Norfolk, Virginia, against your petitioner, a Delaware corporation, for the recovery of Three Hundred Fifty Thousand Dollars ($350,000.00) for alleged breach of contract. (For petition, see Exhibit "A", attached to Petition for Writ of Mandamus.) In such suit, plaintiff prayed for attachment of assets belonging to your petitioner in the hands of other parties joined therein as defendants solely for the purpose of

the attachment. The suit in question was authorized by the provisions of Chapter 269 of the Virginia Code, and more particularly by Sections 6378, 6379, 6380 and 6382, thereof, which relate to persons who may sue out attachments, grounds thereof, jurisdiction, practise and pleading. (For text of these sections see Appendix I.)

Your petitioner thereupon duly complied in all respects with the provisions of the Judicial Code of the United States relating to the removal of cases to the federal courts and, on October 2, 1920, filed a certified copy of the record in such cause in the District Court of the United States for the Eastern District of Virginia, which was the district court for the district where such cause was pending. (Sec. 29, Judicial Code.)

Thereafter, said Coalmont Moshannon Coal Company, by its attorney, relying on the authority of Ex parte Wisner, 203 U. S. 449, moved that said cause be remanded on the ground that suits between citizens of different states, pending in the courts of a State of which neither party was a resident, were not removable to the federal courts. On January 8, 1921, the Hon. Edmund Waddill, Judge of said District Court, after due consideration thereof, granted said motion and ordered said cause remanded. (For opinion and order see Exhibits "D" and "E" attached to Petition for Writ of Mandamus.)

Whereupon, on January 24, 1921, your petitioner moved this Court for leave to file herein its petition for a writ of mandamus to be addressed to said Judge ordering him to vacate said order, redocket said cause, and hear and determine the same, or to show cause why this should not be done. On consideration thereof, this Court on January 31, 1921, allowed the motion, ordered the petition filed, and issued a rule directed to said Judge as prayed in said petition.

Specifications of Error.

The remand of this case was erroneous in the following particulars:

1. Said Judge should have held that suits of a civil nature at common law between citizens of different states, involving exclusive of interest and costs, the sum of Three Thousand Dollars ($3000.00) are removable to United States district courts for the district where such suit is pending regardless of the fact that neither party is a resident of such district.

2. Said Judge should have held that said suit brought in the Circuit Court of the City of Norfolk, Virginia, was such a suit of a civil nature at common law and was therefore rightfully removed.

Argument.

I.

The statutory provisions relative to jurisdiction and venue of suits brought in or removed to United States District Courts.

Section 24 of the Judicial Code in force Jan. 1, 1912 (U. S. Compiled Statutes, section 968), as amended by the act of October 6, 1917, 40 Stat. at L. Chap. 97, Section 1, p. 395, prescribes the nature of suits over which United States District Courts shall have original jurisdiction. (For text of this section and of the amendment see Appendix II.)

Section 51 (U. S. Compiled Statutes, Section 1033) thereof prescribes the district wherein such suits shall be brought, and provides *inter alia*, "where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of residence of either the plaintiff or the defendant." (For full text see Appendix II.)

Section 28 of the Judicial Code (U. S. Compiled Statutes, section 1010), as amended by the act of January 20, 1914, 38 Stat. at L. Chap. 11, p. 278, provides for the removal of causes. The relevant part thereof is:

> "Any suit of a civil nature, at law or in equity, arising under the Constitution, or laws of the United States, or treaties made, or which shall be made, under their authority, of which the district courts of the United States, are given original jurisdiction by this title, which may now be pending or which may hereafter be brought, in any State Court, may be removed by the defendant or defendants therein to the district court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction by this title, and which are now pending or which may hereafter be brought, in any State court, may be removed into the district court of the United States for the proper district by the defendant or defendants therein, being non-residents of that State."

(For full text of this section and of the amendment see Appendix II.)

Section 29 (U. S. Compiled Statutes, section 1011) thereof prescribes the procedure on removal, and provides *inter alia*:

> "Whenever any party entitled to remove any suit mentioned in the last preceding section, except suits removable on the ground of prejudice or local influence, may desire to remove such suit from a State court to the district court of the United

States, he may make and file a petition, duly verified, in such suit in such State court at the time, or any time before the defendant is required by the laws of the State or the rule of the State Court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the district court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such district court, within thirty days from the date of filing said petition, a certified copy of the record in such suit, and for paying all costs that may be awarded by the said district court if said district court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein."

(For full text see Appendix II.)

II.

The decision of Ex Parte Wisner that suits between citizens of different states pending in the courts of a state of which neither party is a resident are not removable to the Federal Courts is based upon the confusion of venue with jurisdiction later removed by the decision of In Re Moore.

In Ex parte Wisner, 203 U. S. 449, sections 1, 2 and 3 of the act of March 3, 1887 (24 Stat. at L. 552, Chap. 373), as corrected by the act of August 13, 1888 (25 Stat. at L. 433, Chap. 866), amending sections 1, 2 and 3 of the act of March 3, 1875 (18 Stat. at L. 470, Chap. 137), now incorporated in the sections of the Judicial Code

heretofore quoted, were so construed as to prevent removal to the United States courts of suits between citizens of different states pending in the courts of a state of which neither party was a resident. The defendant-respondent therein opposed mandamus to remand on the theory that the statutory limitation (now section 51 of the Judicial Code) as to place of original suit brought in United States district courts, was in the nature of a personal privilege to defendant susceptible of waiver, and that, in the case then at bar, he had waived such privilege by removal. (Ex parte Wisner, Brief in Support of Return to Petition for Writ of Mandamus, p. 5 *et seq.*)

Regarding the right of removal, this court, speaking through Mr. Chief Justice Fuller, held:

p. 457,

> "And it is settled that no suit is removable under Section 2 unless it be one that plaintiff could have brought originally in the Circuit Court. Tennessee *v.* Bank, 152 U. S. 454; Mexican National Railroad Co. *v.* Davidson, 157 U. S. 201; Cochran *v.* Montgomery County, 199 U. S. 260, 272."

p. 460,

> "In the present case neither of the parties was a citizen of the State of Missouri, in which State the suit was brought, and, therefore, it could not have been brought in the Circuit Court in the first instance."

Regarding the question of waiver by the defendant-respondent of his alleged privilege as to place of suit, the Court said:

p. 460,

> "But it is contended that Beardsley was entitled to remove the case to the Circuit Court, and as by his petition for removal he waived the ob-

> jection so far as he was personally concerned that he was not sued in his district, hence that the Circuit Court obtained jurisdiction over the suit. This does not follow, inasmuch as in view of the intention of Congress by the act of 1887 to contract the jurisdiction of the Circuit Courts, and of the limitations imposed thereby, jurisdiction of the suit could not have obtained, even with the consent of both parties."

The intention of Congress to contract federal jurisdiction is stressed somewhat in the foregoing extract, and in the unquoted concluding part of the opinion. However, where the meaning of a statute is plain, it must be enforced according to its terms without resort to conventional canons of construction.

Thornley *v.* U. S. 113 U. S. 310, 313.

As shown subsequently (Section III of this brief) there is no ambiguity in the statute here under consideration.

The decision of Ex parte Wisner, supra, so far as it relates to waiver was based on an erroneous theory that the venue provisions of the acts (now section 51 of the Judicial Code) relate to the jurisdiction of district courts, for otherwise the court would have undoubtedly recognized the elementary principle that venue can be waived even though it might regard the application thereof as inappropriate. That this basic error was also responsible for the conclusion that the case could not be removed can be tested by an examination of the authorities cited by the Court in support thereof.

These, (viz: State of Tennessee *v.* The Union & Planters Bank et al, 152 U. S. 454; The Mexican National R. Co. *v.* Davidson, 157 U. S. 201; Cochran et al *v.* County of Montgomery, 199 U. S. 260) merely hold that to be removable a suit must be within the jurisdictional provisions of the act (section 24 of the Code). The unex-

plained extension of this rule in Ex parte Wisner, supra, so as to require compliance with that provision of the act corresponding to section 51 of the Code is explicable only on the theory that here also the Court treated the nature of that provision (section 51) as identical with the nature of the provision corresponding to section 24 of the Code.

In the Matter of Moore, 209 U. S. 490, and Western Loan & Savings Company *v.* Butte & Boston Consolidated Mining Co., 210 U. S. 368, removed this confusion between venue (section 51) and jurisdiction (section 24) which underlies the entire decision of Ex parte Wisner, supra. These cases held in terms that the provisions of section 51 of the Judicial Code relate to venue and not to jurisdiction and can therefore be waived by the parties. The contrary doctrine, said Mr. Justice Brewer (In the Matter of Moore, supra, p. 501), "ignores the distinction between the general description of the jurisdiction of the United States Court and the clause naming the particular district in which an action must be brought." The ratio decidendi of Ex parte Wisner, supra, so far as it relates both to the right of removal and to waiver on removal has, therefore, been held by this Court to be erroneous.

If such reversal of the reasoning does not reverse the conclusion resulting therefrom, here under consideration, it at least leaves such conclusion again an open question to be considered de novo.

III.

The theory that suits between citizens of different states pending in the courts of a state of which neither party is a resident are removable to United States District Courts for the district where the suits are pending is supported by principle and by authority.

Prior to Ex parte Wisner, supra, text writers and judges, including Justices Gray and Brewer, almost unanimously pronounced in favor of the right here contended for. (See cases and texts collected in the opinion of Cochran, D. J. in Louisville & N. R. Co. *v.* Western Union Telegraph Co., 218 Fed. 91, pp. 93-95.) The novel principle of Ex parte Wisner, supra, was deduced from the established rule that no suit is removable unless it is within the original jurisdiction of district courts. Although supported by citation of authority, this is merely declaratory of the precise letter of the statute, viz: "Any other suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction by this title, * * * may be removed * * *." (Judicial Code, section 28.)

The term "district courts of the United States" there used, is a class term and, since section 51 relates solely to the venue of original actions, the only provisions of the title specified giving jurisdiction to district courts as a class are those of section 24 of the Judicial Code.

> McCormick Harvesting Machine Co. *v.* Walthers, 134 U. S. 41, 43;
> Interior Construction & Improvement Co. *v.* Gibney et al, 160 U. S. 217, 219,
> Sweeney *v.* Carter Oil Co., 199 U. S. 252, 259.

Jurisdiction under section 24 depends on either subject matter of the action or identity of the parties. Suits be-

tween citizens of different states fulfilling the requirements of this section would seem therefore to be removable *ipso facto* if not pending in the courts of the state of the defendant's residence. (Judicial Code, section 28.)

The district court to which such suits may be removed is specified in section 29 of the Judicial Code, viz: "the district court to be held in the district where such suit is pending."

These conclusions have been reached in the following cases decided subsequent to Ex parte Wisner, *supra*:

Louisville & N. R. Co. *v.* Western Union Telegraph Co., 218 Fed. 91;
Sanders *v.* Western Union Telegraph Co., 261 Fed. 697;
Earles *v.* Germain Co., 265 Fed. 715;
M. Hohenberg & Co. *v.* Mobile Liners, Inc., 245 Fed. 169;
James *v.* Amarillo City Light & Water Co., 251 Fed. 337.

The opinion of Cochran, D. J., in Louisville & N. R. Co. *v.* Western Union Telegraph Co., *supra*, is an exhaustive and illuminating exposition of the law ably supported by the decisions of Newman, D. J., and Ervin, D. J., in Sanders *v.* Western Union Telegraph Co., *supra*, and in James *v.* Amarillo City Light & Water Co., *supra*, respectively.

The conclusions there reached and here contended for, are believed to be in accord with the views of this Court regarding the right of removal of suits by aliens against citizens. By paragraph 1, section 24, of the Judicial Code, district courts are given original jurisdiction of such suits subject to the same qualifications as those affecting suits between citizens of different states. A logical application of the doctrine of Ex parte Wisner, *supra*, however, would prevent removal of all such causes

contrary to the permissive provisions of section 28 of the Code. This abrogation of the statute must inevitably result from the fact that according to Ex parte Wisner, *supra*, such causes are not removable unless pending in the district of the citizen defendant's residence, whereas, if pending in such district, the citizen defendant cannot remove because section 28 grants such right only to non-residents of the district.

In the Matter of Tobin, 214 U. S. 506, and In the Matter of Nicola, 218 U. S. 668, decided without opinion, are believed, however, to affirm the right of non-resident citizen defendants to remove. The cases in question arose on application by alien plaintiffs for mandamus to effect a remand of such cases alleged to have been improperly removed. Mandamus was then regarded as the remedy appropriate to plaintiffs to secure a review of the propriety of removal.

Ex parte Wisner, *supra;*
In the Matter of Harding, 219 U. S. 363.

Since mandamus was not denied on the ground that plaintiff had invoked an improper remedy, it must have been refused because the cases were rightfully removed. However, such cases were removable only, if Ex parte Wisner, *supra*, was erroneously decided.

The construction of the removal statute in Ex parte Wisner, *supra*, effects inconsistencies resulting in inconvenience and injustice. As above shown, it prevents removal of suits by aliens against citizens contrary to the letter and spirit of the law. Furthermore, it makes possible for the citizens of twenty states of the Union where there are more than one district to bring suit in the courts of his own state against citizens of other states and prevent removal thereof to federal courts. This clearly was not the intent of Congress nor is it within the letter of the statute. A construction which results in

inconvenience or injustice will not be given to a statute unless it is plain that such was the meaning of the legislature.

U. S. *v.* Fisher, 2 Cranch 358, 386.
Lau Ow Bew *v.* U. S., 144 U. S. 47, 59.

Here such intention is not manifest.

In the foregoing, the appropriate sections of the Judicial Code, rather than those of the prior acts, have been cited for convenience, but there is nothing in the prior acts or in the history of such legislation which sheds any unfavorable light on the theory advanced. (See opinion of Cochran, D. J., in Louisville & N. R. Co. *v.* Western Union Telegraph Company, *supra*, pp. 96-102 inclusive.)

It is submitted, therefore, that suits between citizens of different states of the category described in section 24 of the Judicial Code pending in any state court whatsoever are removable to the district court of the United States for the district where the particular case is pending. The suit herein question, viz: Coalmont Moshannon Coal Company *v.* Matthew Addy Steamship & Commerce Corporation *et al.*, was, therefore, properly removed if it was of the nature described in section 24 of the Code.

IV.

The suit here under consideration is a suit of civil nature at common law and is therefore removable.

In his opinion granting the motion to remand the present case, the District Judge said (Exhibit D attached to Petition for Writ of Mandamus, p. 20):

> "The court is further influenced in its action by the fact that this proceeding is a somewhat novel one, in that it is a simple attachment instituted under a new Virginia statute, not an attachment sued out in and as incident to a suit, as heretofore prevailing in the commonwealth, but a legal proceeding consisting only of the attachment, and since original jurisdiction cannot be acquired by attachment in the federal court (Hughes, Fed. Pro., 2nd ed., sec. 106, p. 275, Big Vein Coal Co. *vs.* Read, 229 U. S. 31), the character of this proceeding may give force to the suggestion that the same in no event could have been inaugurated in the federal court, and hence it cannot be removed thereto."

(For the Virginia statutes under which suit was brought see Appendix I.) The suit in question was for the recovery of $350,000.00, interest and costs, as damages for breach of contract. (For Petition, see Exhibit A to Petition for Writ of Mandamus, p. 6.) The subject matter of the suit was, therefore, of a civil nature at common law. The section of the Judicial Code creating jurisdiction on original suit (section 24) and on removal (section 28) are concerned with the nature of the suit and not with the form of remedy prescribed by local statute.

Ellis *v.* Davis, 109 U. S. 485, 497.
Gaines *v.* Fuentes, 92 U. S. 10, 24.
Courtney *v.* Pradt, Executor, *et al.*, 196 U. S. 89.

In Hyde *v.* Stone, 20 How. 170, it was said, p. 175:

> "But this court has repeatedly decided that the jurisdiction of the courts of the United States over controversies between citizens of different States cannot be impaired by the laws of the States which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power."

"Otherwise", as said by Amidon, D. J., in In re Stutsman County, N. D. 88 Fed. 337, 341, "it would be in the power of the states to defeat that jurisdiction entirely by hostile legislation hedging about the commencement of suits by a statutory procedure, which could not be employed in the federal courts."

An illustration of the danger against which this Court has sought to guard is found in the present case, which is an attachment suit, and not a suit to which attachment is auxiliary. (See Virginia Statutes, Appendix I, and quotation from opinion of Waddill, J., above.)

It is submitted, therefore, that the suit here in question, viz: Coalmont Moshannon Coal Co. *v.* Matthew Addy Steamship & Commerce Corporation *et al.*, is a suit of a civil nature at common law within the meaning of the provisions of the Judicial Code relating to removal.

Conclusion.

For reasons above stated, the suit of Coalmont Moshannon Coal Co. *v.* Matthew Addy Steamship & Commerce Corporation *et al.*, was rightfully removed to the United States District Court for the Eastern District of Virginia, and it is submitted that this Court should enter judgment ordering the Judge of said Court to have said cause of action redocketed and to hear and determine it according to law.

February, 1921.

Nelson B. Cramer,
T. K. Schmuck,
Attorneys for Petitioner.

APPENDIX I.

CODE OF VIRGINIA

6378. Who may sue out an attachment—

If any person have a claim, legal or equitable, to any specific personal property, or a like claim to any debt, whether such debt be due and payable or not, or to damages for breach of any contract, express or implied, or to damages for a wrong, and such claim exceed twenty dollars, exclusive of interest, he may sue out an attachment therefor on any one or more of the grounds stated in the following section, except that if the claim be for a debt not due and payable, no attachment shall be sued out, where the only ground for the attachment is that the defendant or one of the defendants against whom the claim is, is a foreign corporation, or is not a resident of this State and has estate or debts owing to the said defendant within this State.

6379. Grounds of attachment.

The following shall be sufficient grounds for an attachment. That the principal defendant or one of the principal defendants:

First. Is a foreign corporation, or is not a resident of this State, and has estate or debts owing to said defendant within the county or city in which the attachment is, or that said defendant being a non-resident of this State, is entitled to the benefit of any lien, legal or equitable, on property, real or personal, within the county or city in which the attachment is. The word "estate", as

herein used, shall include all rights or interests of a pecuniary nature which can be protected, enforced, or proceeded against in courts of law or equity; or,

SECOND. It removing or is about to remove out of this State with intent to change his domicile; or,

THIRD. That the said debtor intends to remove, or is removing, or has removed the specific property sued for, or his own estate, or the proceeds of the sale of his property, or a material part of such estate or proceeds, out of this State, so that there will probably not be therein effects of such debtor sufficient to satisfy the claim when judgment is obtained therefor, should only the ordinary proceeds of law be used to obtain the judgment.

FOURTH. Is converting, or is about to convert, or has converted his property of whatever kind, or some part thereof, into money, securities, or evidences of debt, with intent to hinder, delay, or defraud his creditors; or,

FIFTH. Has assigned or disposed of, or is about to assign or dispose of his estate, or some part thereof, with intent to hinder, delay, or defraud his creditors; or,

SIXTH. Has absconded, or is about to abscond from the State, or has concealed himself therein to the injury of his creditors, or is a fugitive from justice.

The intent mentioned in clauses four and five above may be stated either in the alternative or conjunctive.

6380. Courts having jurisdiction of attachment; practice and procedure therein.—

The jurisdiction of attachments under this chapter shall be in the circuit courts of the counties and in the

circuit and such city courts of the cities as have civil jurisdiction in common law cases, and the practice and procedure, except as otherwise provided, shall be the same, as near as may be, as in personal actions.

6382. Pleadings in attachment.—

No pleading on behalf of the plaintiff shall be necessary except the petition mentioned in the following section. The principal defendant, and any other defendant who seeks to defeat the petitioner's attachment, may demur to the petition, issue on which demurrer shall be deemed to be joined, but if the demurrer be overruled, he shall answer the same or state his grounds of defense in writing, to neither of which shall any replication be necessary, but the cause shall be deemed to be at issue on the answer or the grounds stated. The answer or grounds of defense shall be sworn to by such defendant, or his agent. Any other defendant may answer or state the grounds of his defense to the petition, under oath, and the cause shall be deemed at issue as to him, if he denies any of the allegations of the petition, without any replication. Answers under this section shall not have the effect of evidence for the defendant.

APPENDIX II.

JUDICIAL CODE.

CHAPTER TWO.

DISTRICT COURTS—JURISDICTION.

SEC. 24. The district courts shall have original jurisdiction as follows:

First.—Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, or between citizens of the same State claiming lands under grants from different States; or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (*a*) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (*b*) is between citizens of different States, or (*c*) is between citizens of a State and foreign States, citizens, or subjects. No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made: *Provided, however,* That the foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraph of this section. (*36 Stat. L., 1091.*)

Second.—Of all crimes and offenses cognizable under the authority of the United States. (*36 Stat. L., 1091.*)

Of crimes and offenses.

R. S., ss. 563, pars. 1, 2; 629, pars. 19, 20; 13 s. 2; 1 Supp., 795.

Aug., 1888, 25 Stat. L., 433, c. 866; 1 Supp., 611. 4 Sept., 1890, 26 Stat. L., 424, c. 874.

Third.—Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it; of all seizures on land or waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize. (*36 Stat. L., 1091.*)

Admiralty causes, seizures, and prizes.

R. S., ss. 563, pars. 8, 9; 629, par. 6.

Fourth.—Of all suits arising under any law relating to the slave trade. (*36 Stat. L., 1092.*)

Of suits under any law relating to the slave trade.

R. S., s. 629, par. 7.

Fifth.—Of all cases arising under any law providing for internal revenue, or for revenue from imports or tonnage, except those cases arising under any law providing revenue from imports, jurisdiction of which has been conferred upon the Court of Customs Appeals. (*36 Stat. L., 1092.*)

Of cases under internal-revenue, customs, and tonnage laws.

R. S., ss. 563, par. 5; 629, par. 4.

Sixth.—Of all cases arising under the postal laws. (*36 Stat. L., 1092.*)

Of suits under postal laws.

R. S., ss. 563, par. 7; 629, par. 4.

Seventh.—Of all suits at law or in equity arising under the patent, the copyright, and the trade-mark laws. (*36 Stat. L., 1092.*)

Of suits under the patent, the copyright and trade-mark laws.

R. S., s. 629, par. 9; 20 Feb., 1905, 33 Stat. L., 728, c. 592, s. 17.

Eighth.—Of all suits and proceedings arising under any law regulating commerce, except those suits and proceedings exclusive jurisdiction of which has been conferred upon the Commerce Court. (*36 Stat. L., 1092.*)

Of suits for violations of interstate commerce laws.

4 Feb., 1887, 24 Stat. L., 382, c. 104, s. 9; 1 Supp., 530.

Mar., 1889, 25 Stat. L., 857, c. 382; 1 Supp., 684. 10 Feb., 1891, 26 Stat. L. 743, c. 128; 1 Supp., 891. 11 Feb., 1893, 27 Stat. L., 443, c. 83; 2 Supp., 80. 8 Feb., 1895, 28 Stat. L., 643, c. 61; 2 Supp., 369.

Ninth. Of all suits and proceedings for the enforcement of penalties and forfeitures incurred under any law of the United States. (*36 Stat. L., 1092.*)

Tenth. Of all suits by the assignee of any debenture for drawback of duties, issued under any law for the collection of duties, against the person to whom such debenture was originally granted, or against any indorser thereof, to recover the amount of such debenture. (*36 Stat. L. 1092.*)

Eleventh. Of all suits brought by any person to recover damages for any injury to his person or property on account of any act done by him, under any law of the United States, for the protection or collection of any of the revenues thereof, or to enforce the right of citizens of the United States to vote in the several States. (*36 Stat. L., 1092.*)

Twelfth. Of all suits authorized by law to be brought by any person for the recovery of damages on account of any injury to his person or property, or of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section nineteen hundred and eighty, Revised Statutes. (*36 Stat. L., 1092.*)

Thirteenth. Of all suits authorized by law to be brought against any person who, having knowledge that any of the wrongs mentioned in section nineteen hundred and eighty, Revised Statutes, are about to be done, and, having power to prevent or aid in preventing the same, neglects or refuses so to do, to recover damages for any such wrongful act. (*36 Stat. L., 1092.*)

Fourteenth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage of any State, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States. (*36 Stat. L., 1092.*)

Of suits to redress deprivation, under color of law, of civil rights.
R. S., ss. 563, par. 12; 629, par. 16.

Fifteenth. Of all suits to recover possession of any office, except that of elector of President or Vice-President, Representative in or Delegate to Congress, or member of a State legislature, authorized by law to be brought, wherein it appears that the sole question touching the title to such office arises out of the denial of the right to vote to any citizen offering to vote, on account of race, color, or previous condition of servitude: *Provided*, That such jurisdiction shall extend only so far as to determine the rights of the parties to such office by reason of the denial of the right guaranteed by the Constitution of the United States, and secured by any law, to enforce the right of citizens of the United States to vote in all the States. (*36 Stat. L. 1092.*)

Of suits to recover certain offices.
R. S., ss. 563, par 13; 629, par. 13.

Sixteenth. Of all cases commenced by the United States, or by direction of any officer thereof, against any national banking association, and cases for winding up the affairs of any such bank; and of all suits brought by any banking association established in the district for which the court is held, under the provisions of title "National Banks," Revised Statutes, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by said title. And all National banking associations established under the laws of the

Of suits against national banking associations.
R. S., ss. 563, par 15; 629, pars. 10, 11; 12 July, 1882, 22 Stat L., 163, c. 290, s. 4; 1 Supp., 354. 13 Aug., 1888, 25 Stat. L., 436, c. 866, s. 4; 1 Supp., 614.

United States shall, for the purposes of all other actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located. (*36 Stat. L. 1092.*) [See §§49, 64.]

Seventeenth. Of all suits brought by any alien for a tort only, in violation of the laws of nations or of a treaty of the United States. (*36 Stat. L., 1093.*)

Eighteenth. Of all suits against consuls and vice-consuls. (*36 Stat. L., 1093.*)

Nineteenth. Of all matters and proceedings in bankruptcy. (*36 Stat. L., 1093.*)
L., 545, 552. c. 541, ss. 2, 23; 2 Supp., 843.

Twentieth. Concurrent with the Court of Claims, of all claims not exceeding ten thousand dollars founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: *Provided, however,* That nothing in this paragraph shall be construed as giving to either the district courts or the Court of Claims jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as "war claims," or to hear and determine other claims which had been rejected or re-

ported on adversely prior to the third day of March, eighteen hundred and eighty-seven, by any court, department, or commission authorized to hear and determine the same, or to hear and determine claims for pensions; or as giving to the district courts jurisdiction of cases brought to recover fees, salary, or compensation for official services of officers of the United States or brought for such purpose by persons claiming as such officers or as assignees or legal representatives thereof; but no suit pending on the twenty-seventh day of June, eighteen hundred and ninety-eight, shall abate or be affected by this provision: *And provided further,* That no suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made: *Provided,* That the claims of married women, first accrued during marriage, of persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the suit be brought within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively. All suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury. (*36 Stat. L., 1093.*)

Limitations.

Claims of married women, etc.

Twenty-first. Of proceedings in equity, by writ of injunction, to restrain violations of the provisions of laws of the United States to prevent the unlawful inclosure of public lands; and it shall be sufficient to give the court jurisdiction if service of original process be had in any civil proceeding on any agent or employee having charge or control of the inclosure. (*36 Stat. L., 1093.*)

Of suits for the unlawful inclosure of public lands.

25 Feb., 1885, 23 Stat. L., 321, c. 149, s. 2; 1 Supp., 478.

Twenty-second. Of all suits and proceedings arising under any law regulating the immigration of aliens, or under the contract labor laws. (*36 Stat. L., 1093.*)

s. 3; 1 Supp., 479. 3 Mar., 1891, 26 Stat. L., 1086, c. 551. 3 Nov., 1893, 28 Stat. L., 7, c. 14, s. 6; 2 Supp., 153. 29 L., 907, c. 1134, s. 29.

Twenty-third. Of all suits and proceedings arising under any law to protect trade and commerce against restraints and monopolies. (*36 Stat. L., 1093.*)

Twenty-fourth. Of all actions, suits, or proceedings involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty. And the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him; but this provision shall not apply to any lands now or heretofore held by either of the Five Civilized Tribes, the Osage Nation of Indians, nor to any of the lands within the Quapaw Indian Agency: *Provided*, That the right of appeal shall be allowed to either party as in other cases. (*36 Stat. L., 1094.*)

Twenty-fifth. Of suits in equity brought by any tenant in common or joint tenant for the partition of lands in cases where the United States is one of such tenants in common or joint tenants, such suits to be brought in the district in which such land is situate. (*36 Stat. L., 1094.*)

AMENDMENT TO SECTION 24 OF THE JUDICIAL CODE.

October 6, 1917 (S. 2916).
(Public, No. 82.)

CHAP. 97.—An Act to amend sections twenty-four and two hundred and fifty-six of the Judicial Code, relating to the jurisdiction of the district courts, so as to save the claimants the rights and remedies under the workmen's compensation law of any State.

Judicial Code. Vol. 36, p. 1091, amended.
District Courts. Jurisdiction in admiralty and maritime causes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That clause three of section twenty-four of the Judicial Code is hereby amended to read as follows:

Extended to State workmen's compensation laws.

"Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, and to claimants the rights and remedies under the workmen's compensation law of any State; of all seizures on land or waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize." * * *

Approved, October 6, 1917.

(40 Stat. at L., Part I, p. 395.)

CHAPTER THREE.

District Courts—Removal of Causes.

Removal of suits from State to United States district courts.
3 Mar., 1875, 18 Stat. L., 470, c. 137, s. 2.
13 Aug., 1888, 25 Stat. L., 434, c. 866, s. 2; 1 Supp., 612.

SEC. 28. Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the district courts of the United States are given original jurisdiction by this title, which may now be pending or which may hereafter be brought, in any State court, may be removed by the defendant or defendants therein to the district court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction by this title, and which are now pending or which may hereafter be brought, in any State court, may be removed into the district court of the United States for the proper district by the defendant or defendants therein, being non-residents of that State. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the district court of the United States for the proper district. And where a suit is now pending, or may hereafter be brought, in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the district court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said district court that from prejudice or local influence he will not be able to obtain justice in such State

By non-resident defendants.

By one or more several defendants when there is a separable controversy.

On account of prejudice or local influence.

court, or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause: *Provided*, That if it further appear that said suit can be fully and justly determined as to the other defendants in the State court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said district court may direct the suit to be remanded, so far as relates to such other defendants, to the State court, to be proceeded with therein. At any time before the trial of any suit which is now pending in any district court, or may hereafter be entered therein, and which has been removed to said court from a State court on the affidavit of any party plaintiff that he had reason to believe and did believe that, from prejudice or local influence, he was unable to obtain justice in said State court, the district court shall, on application of the other party, examine into the truth of said affidavit and the grounds thereof, and, unless it shall appear to the satisfaction of said court that said party will not be able to obtain justice in said State court, it shall cause the same to be remanded thereto. Whenever any cause shall be removed from any State court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed: *Provided*, That no case arising under an act entitled "An act relating to the liability of common carriers by railroad to their employees in certain cases," approved April twenty-second, nineteen hundred and eight, or any amendment thereto, and brought in any State court of competent jurisdiction shall be removed to any court of the United States. (*36 Stat. L., 1094.*)

AMENDMENT TO SECTION 28 OF THE JUDICIAL CODE.

January 28, 1914.
(S. 3484).
(Public No. 48.)

Chap. 11.—An Act to amend an Act entitled "An Act to codify, revise and amend the laws relating to the judiciary," Approved March 3, nineteen hundred and eleven, being chapter two hundred and thirty-one of Thirty-sixth Statutes at Large.

Judicial Code.
Removal of causes from state to district courts. Vol. 36, p. 1095 amended.

Be it enacted by the Senate and House of Representatives of the United States in Congress assembled, That the Act entitled "An Act to codify, revise, and amend the law relating to the judiciary", approved March third, nineteen hundred and eleven, being chapter two hundred and thirty-one of Thirty-sixth Statutes at Large, be amended by inserting at the conclusion of section twenty-eight, chapter three, of said Act, the following:

Damages in interstate transportation.
Not removable unless over $3000.
Vol. 24, p. 386;
Vol. 34, p. 593;
Vol. 35, p. 648;
Vol. 36, p. 555.

"And provided further, That no suit in any State Court of competent jurisdiction against a railroad company, or other corporation, or person, engaged in and carrying on the business of a common carrier, to recover damages for delay, loss of, or injury to property received for transportation by such common carrier under section twenty of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, as amended June twenty-ninth, nineteen hundred and six, April thirteenth, nineteen hundred and eight, February twenty-fifth, nineteen hundred and nine, and June eighteenth, nineteen hundred and ten, shall be removed to any court of the United States where the matter in controversy does not exceed, exclusive of interest and costs, the sum or value of $3000." *(38 Stat. at L., p. 278.)*

SEC. 29. Whenever any party entitled to remove any suit mentioned in the last preceding section, except suits removable on the ground of prejudice or local influence, may desire to remove such suit from a State court to the district court of the United States, he may make and file a petition, duly verified, in such suit in such State court at the time, or any time before the defendant is required by the laws of the State or the rule of the State court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such *suit into the district court to be held in the district where such suit is pending*, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such district court, within thirty days from the date of filing said petition, a certified copy of the record in such suit, and for paying all costs that may be awarded by the said district court if said district court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein. It shall then be the duty of the State court to accept said petition and bond and proceed no further in such suit. Written notice of said petition and bond for removal shall be given the adverse party or parties prior to filing the same. The said copy being entered within said thirty days as aforesaid in said district court of the United States, the parties so removing the said cause shall, within thirty days thereafter, plead, answer, or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in the said district court. (*36 Stat. L., 1095.*)

CHAPTER FOUR.

District Court—Miscellaneous Provisions.

Civil suits; where to be brought.
R. S., s. 739.
13 Aug., 1888, 25 Stat. L., 434, c. 866; 1 Supp., 611.

Sec. 51. Except as provided in the five succeeding sections, no person shall be arrested in one district for trial in another, in any civil action before a district court; and, except as provided in the six succeeding sections, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant. (*36 Stat. L., 1101.*)

Number 30.

IN THE

Supreme Court of the United States

October Term, 1920.

IN THE MATTER

OF

MATTHEW ADDY STEAMSHIP AND COMMERCE CORPORATION, a Delaware Corporation,

Petitioner.

PETITION FOR WRIT OF MANDAMUS.

ANSWER OF EDMUND WADDILL, JR., UNITED STATES DISTRICT JUDGE FOR THE EASTERN DISTRICT OF VIRGINIA.

GILBERT R. SWINK,
EDWARD R. BAIRD, JR.,
Attorneys for Respondent.

W. T. BARRON & CO., PRINTERS, NORFOLK, VA.

Number 30.

IN THE

Supreme Court of the United States

October Term, 1920.

IN THE MATTER *of* MATTHEW ADDY STEAMSHIP AND COMMERCE CORPORATION, a Delaware Corporation, Petitioner.	PETITION for Writ of Mandamus

ANSWER OF EDMUND WADDILL, JR., UNITED STATES DISTRICT JUDGE FOR THE EASTERN DISTRICT OF VIRGINIA.

To the Hon. The Chief Justice, and the Associate Justices of the Supreme Court of the United States of America:

The answer of Edmund Waddill, Jr., United States District Judge for the Eastern District of Virginia, to the petition filed in the Supreme Court of the United States of America, on the 24th day of January, 1920, by the Matthew Addy Steamship and Commerce Corporation, respectfully shows to this Honorable Court that:

FIRST: That the action taken by the respondent upon the motion duly made before the United States District Court for the Eastern District of Virginia, to remand said case to the

circuit court of the city of Norfolk, from which the same had been removed, is fully set forth, with respondent's reasons for the action taken, in the opinion filed and order entered upon said motion, copies of which are attached to petitioner's application for mandamus.

SECOND: Respondent says that the prayer of the petition for mandamus should be denied, and said petition dismissed, for the reason that mandamus can not be used to take the place of an appeal, even assuming the right of appeal to exist, which is not the fact.

THIRD: Respondent says that the petitioner's right to mandamus should be denied, and said petition and all proceedings thereunder dismissed, for the reason that the same is in plain contravention of the federal statute which denies the right of appeal from a decision of a district court remanding a case to the court from which it was removed. Section 28 of the Judicial Code is as follows:

> "Sec. 28. * * * Whenever any cause shall be removed from any state court into any district court of the United States, and the district court shall decide that the cause is improperly removed, and order the same to be remanded to the state court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed."

Respondent says that the petition for mandamus is wholly without merit, and asks that it, together with all proceedings had therein, may be dismissed.

United States District Judge for the
Eastern District of Virginia.

Richmond, Va., March 11, 1921.

Supreme Court of the United States

October Term, 1920.

No. 30 Orig.

IN THE MATTER

OF

MATTHEW ADDY STEAMSHIP & COMMERCE CORPORATION, a Delaware Corporation.

BRIEF ON PETITION FOR WRIT OF MANDAMUS

NELSON B. CRAMER,
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Attorneys for the Petitioner.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1920.

IN THE MATTER *of* MATTHEW ADDY STEAMSHIP & COMMERCE CORPORATION, a Delaware Corporation, Petitioner.	No.

BRIEF ON PETITION FOR WRIT OF MANDAMUS.

The purpose of this brief is not to discuss the merits of the question to be determined if a writ of mandamus shall issue pursuant to your petitioner's prayer but to establish, first, the propriety of the application for such writ, and, second, the necessity for a determination by this court of the question to be presented on the issuance of such writ.

Facts.

Coalmont Moshannon Coal Company, a Pennsylvania Corporation, filed suit on September 21,

1920, in the Circuit Court of the City of Norfolk, Virginia, against your petitioner, a Delaware Corporation, for the recovery of Three Hundred Fifty Thousand Dollars ($350,000.00), for alleged breach of contract. (For petition, see Exhibit "A", attached to petition for writ of mandamus). In such suit, plaintiff prayed for the attachment of assets belonging to your petitioner in the hands of other parties joined therein as defendants solely for the purpose of the attachment. The suit in question was authorized by the provisions of Chapter 269 of the Virginia Code, and more particularly by Sections 6378, 6379, 6380 and 6382, thereof, which relate to the persons who may sue out attachments, the grounds thereof, jurisdiction, practise and pleading. (For text of these sections see Exhibit "B", attached to petition for writ of mandamus.)

Your petitioner thereupon duly complied in all respects with the provisions of the Judicial Code of the United States relating to the removal of cases to the federal courts and on October 2, 1920, filed a certified copy of the record in such cause in the District Court of the United States for the Eastern District of Virginia, which was the district court for the district where such cause was pending. (Sec. 29, Judicial Code).

Thereafter, said Coalmont Moshannon Coal Company, by its attorney, relying on the authority of Ex parte Wisner, 203 U. S. 449, moved that said cause be remanded to the state court, on the ground that suits between citizens of different states, pending in the courts of a State of which neither party was a resident, were not removable to the federal courts. On January 8, 1921, the Hon. Edmund Waddill, Judge of said District

Court, after due consideration thereof, granted said motion and ordered said cause remanded. (For opinion and order see Exhibits "D" and "E" attached to petition for writ of mandamus.)

Whereupon, your petitioner filed its petition in this Court for a writ of mandamus to be addressed to said Judge, ordering him to vacate said order, redocket said cause and hear and determine the same, or to show cause why this should not be done.

I.

The conflicting doctrines adopted and enforced by various district judges as to the right of removal resulting from different interpretations of the decision of this Court in Ex parte Wisner.

In Ex parte Wisner, 203 U. S. 449, it was held that suits between citizens of different states pending in the courts of a state of which neither party was a resident were not removable to the courts of the United States. The Supreme Court, speaking through Mr. Chief Justice Fuller, stated:

> "And it is settled that no suit is removable under Sec. 2 unless it be one that plaintiff could have brought originally in the Circuit Court. Tennessee *v.* Union & Planters' Bank, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; Mexican Nat. R. Co. *v.* Davidson, 157 U. S. 208, 39 L. ed. 675, 15 Sup. Ct. Rep. 563; Cochran *v.* Montgomery County, 199 U. S. 272, 50 L. ed. 188, 26 Sup. Ct. Rep. 58."

The authorities cited in support of this proposition, however, require only that the given case

satisfy the general jurisdictional requirements relating to district courts as a whole (Section 24 of the Judicial Code). The Court, however, regarded the venue requirements of Section 51 of the Judicial Code as jurisdictional and extended the then existing doctrine so as to permit removal of such cases only as are pending within the district of the residence of either party.

The Court pressed this doctrine to its logical conclusion and stated that the provisions as to the place of suit (Section 51 of the Judicial Code) being jurisdictional could not be waived so as to confer by consent the power to adjudicate. This latter rule is correct only if venue and jurisdiction are synonymous in law. If they are not, the latter doctrine is unsound, and by a parity of reasoning so is the former.

The confusion between venue and jurisdiction, thus created, was removed, so far as it related to waiver and consent, in the cases of In Re Moore, 209 U. S. 490, and Western Loan & Savings Company *v.* Butte and Boston Consolidated Mining Company, 210 U. S. 368, which held in terms that the provisions of Section 51 of the Judicial Code, as to the place of suit, could be waived by the parties. The contrary doctrine of Ex Parte Wisner, *supra,* Mr. Justice Brewer stated:

> "* * * ignores the distinction between the general description of the jurisdiction of the United States Court and the clause naming the particular district in which an action must be brought."
>
> In Re Moore, *supra,* p. 501.

Consequent upon this reversal of the fundamental principle of Ex Parte Wisner, *supra,* to-

gether with the refusal of this Court, in Matter of Tobin, 214 U. S. 506, and Ex Parte Nicola, 218 U. S. 668, to issue writs of mandamus to remand cases removed improperly according to the doctrine of Ex Parte Wisner, *supra*, various district judges have assumed that the latter case was overruled *in toto*, and that suits between citizens of different states, wherever pending, are removable if they satisfy the jurisdictional requirements of Section 24 of the Judicial Code.

These judges support their conclusions with cogent reasoning as to the fundamental unsoundness of the decision of Ex Parte Wisner.

Louisville & N. R. R. Co. *v.* Western Union Telegraph Co., 218 Fed. 91.
Sanders *v.* Western Union Telegraph Co. 261 Fed. 697.
Earles *v.* Germain Co. 265 Fed. 715.
M. Hohenberg & Co. *v.* Mobile Liners, Inc. 245 Fed. 169.
James *v.* Amarillo City Light & Water Co. 251 Fed. 337.

On the contrary, in the cases cited below, the learned judges have chosen to follow literally the decision of this court in Ex Parte Wisner, *supra*, without regard to the reversal of the fundamental principle thereof, and without regard to the apparent tacit reversal by this court of the exact rule which they enforce.

Pendar *v.* Empire Gas & Fuel Co. 260 Fed. 669.
Doherty *v.* Smith, 233 Fed. 132.
Mutual Life Ins. Co. of New York *v.* Painter, *et al.*, 220 Fed. 998.

In Park Square Automobile Station *v.* American Locomotive Co. 222 Fed. 979, it was held that a cause satisfying the jurisdictional requirements of Section 24 of the Judicial Code was removable, but that it was removable not to the United States Court for the district where the suit was pending, as provided by Section 29 of the Judicial Code, and as held in the cases heretofore cited, but to the United States Court for the district of the defendant's residence.

The result of these conflicting views of the law as enunciated by this Court is to make removable to United States courts cases pending in certain states and to prevent the removal of similar cases in other states. The most extraordinary anomaly, however, is presented in the State of Texas. In the Northern District of that State, a case such as the present is removable (James *v.* Amarillo City Light & Water Co. 251 Fed. 337), but in the Southern District thereof it is not removable (Pendar *v.* Empire Gas & Fuel Co. 260 Fed. 669).

II.

The power of this Court to issue the writ of mandamus as prayed.

(A) The issuance of the writ in this case is primarily to regulate the lower courts and to establish in the public interest a uniform rule of law, and is therefore a proper exercise of inherent powers of this Court.

Construing the language of Section 28 of the Judicial Code, this Court has held that it was deprived thereby of its power to review by mandamus the decision of a district court remanding

a cause. Ex Parte The Pennsylvania Co., 137 U. S. 451. The remanded case in question had been removed on the ground of prejudice and local influence. Two matters were apparently involved in the question of the propriety of the removal; first, the requisite jurisdictional amount; second, the sufficiency of the proof of prejudice and local influence. Mr. Justice Bradley, delivering the opinion of the Court, stated, p. 454:

> "It is true that the general supervisory power of this court over inferior jurisdictions is of great moment in a public point of view, and should not, upon light grounds, be deemed to be taken away in any case. Still, although the writ of mandamus is not mentioned in the section, yet the use of the words 'such remand shall be immediately carried into execution,' in addition to the prohibition of apppeal and writ of error, is strongly indicative of an intent to suppress further prolongation of the controversy by whatever process. We are therefore of the opinion that the act has the effect of taking away the remedy by mandamus as well as that of appeal and writ of error."

Clearly no suitor is entitled as a matter of right to a review of a decision in a controversy of a purely private character, and it is undoubtedly true that Congress intended to and did deprive the Supreme Court of its power of review in such cases, within which category was Ex Parte The Pennsylvania Company, *supra*. In the present case, however, the question to be finally and conclusively settled by the issuance of the writ of mandamus is one of public interest. It relates to the general jurisdiction of United States courts and to rights of citizens to choose such tribunals

to hear and determine their disputes. If left unsettled, conflicting doctrines will be enforced in at least nine districts. It is difficult, therefore, to conceive of a case, to paraphrase the language of Mr. Justice Bradley, where the exercise by this Court of its inherent supervisory power over courts of inferior jurisdiction is of greater moment from a public point of view.

The review of the present case results incidentally in the "further prolongation of the controversy" between the parties thereto intended by Congress to be "suppressed," but in the broader view of things it will prevent unnecessary future controversies regarding a simple right of all citizens, and it will establish a uniform rule of law for the guidance of bewildered suitors and judges. It is not believed that it was the intent of Congress to deprive this Court of its inherent regulatory powers in such a case as this, and it is questioned whether it could validly dispossess this Court created by the Constitution of powers essential to its functioning as the supreme and "rightful expositor of its laws", viz., of the laws of the United States.

> Bank of Hamilton *v.* Lessee of Dudley, 2 Pet. 492.
>
> Monongahela Navigation Co. *v.* United States, 148 U. S. 312.

It is submitted that the present case is distinguishable from Ex Parte The Pennsylvania Company, *supra*, on the grounds above stated, and the inherent power to regulate lower courts and the express power to issue mandamus granted by Section 234 of the Judicial Code may and should be exercised.

(B) This Court may assume jurisdiction herein by issuing the writ of mandamus prayed for, inasmuch as a constitutional question is involved.

Art. IV., Sec. 2 of the Constitution of the United States provides:

> "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

The choice of courts, whether on institution of original suit, or by removal, is undoubtedly a privilege. While a corporation is not generally regarded as a citizen within the meaning of the constitutional provision quoted so as to require uniformity of privilege under state laws, it is a citizen so as to entitle it to removal under the Judicial Code.

> Baltimore & Ohio R. R. Co. *v.* Koontz, Executor, 104 U. S. 5.

The construction erroneously placed upon Ex Parte Wisner, *supra*, by the District Court of the Eastern District of Virginia denying the petitioner's right to remove the present suit to such court operates to deny it a privilege enjoyed within that district by citizens resident there and enjoyed by citizens wheresoever resident and sued within the territorial limits of the Northern District of Texas, of the Southern District of Alabama, of the Northern District of Georgia, and of the Eastern District of Kentucky.

It is submitted that such discrimination is a violation of the constitutional guaranty, and since no method is provided for righting this wrong this Court may properly assume jurisdiction herein by the issuance of a writ of mandamus.

CONCLUSION.

On the foregoing grounds therefor, viz., because the question to be presented is one of public interest of which this Court may properly assume jurisdiction on mandamus and because the question is one involving discrimination between citizens, it is submitted that the writ of mandamus should issue as prayed for in this petitioner's petition.

Respectfully submitted,

NELSON B. CRAMER,
T. K. SCHMUCK,
Attorneys for the Petitioner.

Number 30.

IN THE

Supreme Court of the United States

October Term, 1920.

IN THE MATTER

OF

MATTHEW ADDY STEAMSHIP AND COMMERCE CORPORATION, a Delaware Corporation,

Petitioner.

BRIEF FOR RESPONDENT.

SWINK & FENTRESS,
BAIRD, WHITE & LANNING,
Counsel for Respondent.

GILBERT R. SWINK,
EDWARD R. BAIRD, JR.,
Advocates.

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STATEMENT.

The character of the questions involved, and the manner in which they arise, have been stated in the petition and brief, and nothing further in respect to them need be said. Copies of the pleadings and of Judge Waddill's opinion are filed with the petition, and copies of the statutes to be construed are attached to the brief for the petitioner. These, for purposes of convenience, will be referred to without making them parts of this brief. The controversy is between citizens of different states, involves more than $3,000, was brought in the Circuit Court of the City of Norfolk, removed to the District Court of the United States for the Eastern District of Virginia, and by that Court remanded to the State Court, whereupon the petitioner applied to this Court for a writ of mandamus directing Judge Waddill to vacate his order remanding the case to the State Court, redocket it in the Federal Court, and hear and determine it there. There are presented, therefore, two questions;

First, Is the petition for a writ of mandamus a proper remedy, assuming Judge Waddill erred in remanding the cause to the State Court.

Second, Did Judge Waddill err in remanding to the State Court in which it was begun a suit between citizens of different states removed to the Federal Court of a District in which neither the plaintiff nor the defendant resided?

ARGUMENT.

I.

IS THE PETITION FOR A WRIT OF MANDAMUS A PROPER REMEDY, ASSUMING JUDGE WADDILL ERRED IN REMANDING THE CAUSE TO THE STATE COURT?

If, as we believe, it is clear the petitioner has no right, whatever other remedy it may have, to a mandamus there is no reason why this Court should undertake to determine whether Judge Waddill was right or wrong in what he did. Attention will therefore be devoted chiefly to this point because a disposition of it makes, we think, discussion of the other unnecessary.

The petitioner's position seems to be, so far as we can get an idea of what its counsel really had in mind, that the propriety of the remedy by mandamus was recognized in *Ex Parte Wisner*, 203 U. S. 449, and in *In Re Moore*, 209 U. S. 990. An examination of these cases shows that in the Wisner case a mandamus was awarded directing the Federal Court to remand the cause to the State Court because the Federal Court

"had no jurisdiction to proceed."

In the Moore case the Court denied the prayer of the petition for a mandamus, not passing upon whether it was, or was not,

a proper remedy because the motion to remand had been properly denied, and the petitioner was without right to relief. In the petitioner's brief no mention is made of the numerous cases, subsequent to the Wisner and Moore cases, in which it has been repeatedly and distinctly said that a mandamus could not issue in such a case, nor is there any reference to the provisions of the Judicial Code which dispose of all cavil and question in the premises. As in our opinion the decisions and the Act of Congress referred to set at rest all doubt, and remove all room for difference of view, we will point out just what was decided in those cases and what the statute now is. In *Ex Parte Harding*, 219 U. S. 363, the question as to the propriety of the issuance of a mandamus was the point expressly decided by Mr. Chief Justice White who approved this statement of the rule

> "Mandamus cannot be issued to compel the court below to decide a matter before it in a particular way or to review its judicial action had in the exercise of legitimate jurisdiction, nor can the writ be used to perform the office of an appeal or writ of error."

and said;

> "We must then either reconcile the cases or if this cannot be done determine which line rests upon the right principle, and having so determined, overrule or qualify the others, and apply and enforce the correct doctrine. This is the case, since to do otherwise would serve only to add to the seeming confusion and increase the uncertainty in the future as to a question which it is our plain duty to make free from uncertainty.
>
> "* * * * * * Under these circumstances it becomes our plain duty, while not questioning the general doctrine announced in any of the cases, yet to disapprove and qualify *Ex Parte Wisner*, *In Re Moore*, and *In Re Winn* to the extent that those cases applied the exceptional rule of *Virginia v. Rives*, and thereby obscured the broad dis-

tinction between the general doctrine announced in *Ex Parte Hoard* and the cases which have followed it and the exception established by *Virginia v. Rives* and the cases which have properly applied the doctrine of that case."

In *Ex Parte Park Square Automobile Station*, 244 U. S. 412, Mr. Chief Justice White said;

"At the threshold, however, we are met by the suggestion that, conceding for the sake of argument that the lower court erred in refusing to remand and in taking jurisdiction, as such error was susceptible of being reviewed by the regular methods provided by the statute, that is, by certificate and direct review on the question of jurisdiction alone after final judgment, or by review of the Circuit Court of Appeals where allowed if the whole case were taken to that court, or by the exercise by this court of its power to issue a writ of certiorari in a proper case, there is hence no power to substitute the writ of mandamus as a means of reviewing for the express remedial processes created by the statute for such purpose.

"It is not disputable that the proposition thus relied upon is well founded and hence absolutely debars us from reviewing by mandamus the action of the court below complained of, whatever may be our conviction as to its clear error, *Ex Parte Harding*, 219 U. S. 363; *Ex Parte Roe*, 234 U. S. 70, unless it be that by some exception the case is taken out of the reach of the control of the cases referred to.

" • • • • • • • And this also makes clear that however grave may be the inconvenience arising in this particular case from the construction which the court gave to the statute and upon which it based its assertion of jurisdiction, greater inconvenience in many other cases would necessarily come from now departing from the established rule and reviewing the action of the court by resort to a writ of mandamus instead of leaving the correction of the error to the orderly methods of review established by law."

In *Ex Parte Park & Tilford*, 245 U. S. 82, Mr. Justice Day states the rule thus;

> "Is is elementary that the writ of mandamus will not issue to require the court to make a particular decision, and may only be invoked where the purpose is to require action of a court of competent jurisdiction, where such court has refused to exercise the power of decision with which it is invested by law."

In *Ex Parte Roe*, 234 U. S. 70, Mr. Justice Van Devanter says;

> "Whether the ruling was right or wrong, it was a judicial act, done in the exercise of a jurisdiction conferred by law, and, even if erroneous, was not void or open to collateral attack, but only subject to correction in an appropriate appellate proceeding. *Chesapeake & Ohio Railway Co. v. McCabe*, 213 U. S. 207; *In Re Metropolitan Trust Co.*, 218 U. S. 312. Like any other ruling in the progress of the case, it will be regularly subject to appellate review after final judgment, and the authorized mode of obtaining such a review, the action being at law, is by a writ of error. Judicial Code Sections 128, 238; Missouri Pacific Railway Co. v. Fitzgerald, 160 U. S. 556, 582.
>
> "The accustomed office of a writ of mandamus, when directed to a judicial officer, is to compel an exercise of existing jurisdiction, but not to control his decision. It does not lie to compel a reversal of a decision, either interlocutory or final, made in the exercise of a lawful jurisdiction, especially where in regular course the decision may be reviewed upon a writ of error or an appeal."

Moreover, as pointed out in Judge Waddill's answer, to hold that the writ of mandamus may issue is, in effect, to nullify that portion of Section 28 of the Judicial Code providing;

> "Such remand shall be immediately carried into execution, and no appeal or writ of error from the decision

of the District Court so remanding such case shall be allowed."

If there could be any doubt as to the intention of Congress in using this language, it disappears in the light of Mr. Justice Bradley's opinion in *In Re Pennsylvania Co.*, 137 U. S. 451;

> "But in our opinion, the matter is governed by statute. This will be manifest by reference to previous legislation on the subject. The 5th section of the act of March 3, 1875 (determining the jurisdiction of the Circuit Courts) provided that the order of the Circuit Court dismissing or remanding a cause to the state court should be reviewable by the Supreme Court on writ of error or appeal, as the case might be. 18 Stat. 470, 472 c. 137. This act remained in force until the passage of the act of March 3, 1887, by which it was superseded, and the writ of error or appeal upon orders to remand causes to the state courts, was abrogated. The provision of the act of 1887 is as follows; 'Whenever any cause shall be removed from any state court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the state court from whence it came, *such remand shall be immediately carried into execution*, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed.' 24 Stat. c. 373, 552, 553. This statute was re-enacted August 13, 1888, for the purpose of correcting some mistakes in the enrollment, 25 Stat. c. 866, 433, 435; but the above clause remained without change. In terms, it only abolishes appeals and writs of error, it is true, and does not mention writs of mandamus; and it is unquestionably a general rule, that the abrogation of one remedy does not affect another. But in this case, we think it was the intention of Congress to make the judgment of the Circuit Court remanding a cause to the state court final and conclusive. The general object of the act is to contract the jurisdiction of the Federal Court. The abrogation of the writ of error and appeal would have had

little effect in putting an end to the question of removal, if the writ of mandamus could still have been sued out in this court. It is true that the general supervisory power of this court over inferior jurisdiction is of great moment in a public point of view, and should not, upon light grounds, be deemed to be taken away in any case. Still, although the writ of mandamus is not mentioned in the section, yet the use of the words 'such remand shall be immediately carried into execution,' in addition to the prohibition of appeal and writ of error, is strongly indicative of an intent to suppress further prolongation of the controversy by whatever process. We are, therefore, of opinion that the act has the effect of taking away the remedy by mandamus as well as that of appeal and writ of error."

In Black's Dillon on Removal of Causes, the effect of the enactments and the construction put upon them by this court is stated in Section 223 as follows;

"Under the present statute, therefore, it is quite clear (and the rule has often been reiterated) that the Supreme Court cannot review, on appeal or error, an order of a circuit court remanding a cause to the state court from which it was removed. Further, the new act also takes away the remedy by a mandamus to compel the circuit court to take jurisdiction."

In Foster's Federal Procedure, Fifth Edition, Volume 2, at pages 1927 and 1928, the author says;

"The Supreme Court of the United States cannot review immediately, either by appeal or writ of error, an order of a district court, or of a Circuit Court of Appeals, remanding a cause. * * * * * * The Supreme Court of the United States cannot, by a writ of error to the final judgment of a state court, review an order remanding a cause which was made by a Federal Court. * * * * * * An order remanding a cause cannot be reviewed by mandamus."

Numerous authorities, fully sustaining the foregoing statement, are cited in the notes.

It is too clear to admit of question that a writ of mandamus cannot issue.

II.

DID JUDGE WADDILL ERR IN REMANDING TO THE STATE COURT IN WHICH IT WAS BEGUN A SUIT BETWEEN CITIZENS OF DIFFERENT STATES REMOVED TO THE FEDERAL COURT OF A DISTRICT IN WHICH NEITHER THE PLAINTIFF NOR THE DEFENDANT RESIDED?

We are so certain of the soundness of the objections to the remedy sought that we are confident this Court will not undertake to inquire, at this time and in the manner proposed, whether the case ought, or ought not, to have been remanded. Nevertheless, as the question is raised in the petition and argued in the brief, we suppose it proper to point out that whatever difference of opinion there may be on the part of the several District Courts there is no doubt as to the views of this Court. They are that the statute vests the District Courts with jurisdiction wherever there exists the requisite diversity of citizenship, and the amount in controversy, exclusive of interest and costs, exceeds $3,000, but the courts which may exercise this jurisdiction are those only of the District in which either the plaintiff or the defendant resides, and no suit can be removed to any court in which it could not have been brought. Such difference of opinion as has arisen in the District Courts seems attributable to the convenient or inconvenient results which the Judges of those courts felt might follow in the instant cases. This Court, however, is certainly not called upon to renew the expression of its views upon a point in respect to which its opinion has been already clearly

set forth. In the Wisner case, *supra,* it was held there was no right to remove certainly unless both the plaintiff and defendant consented. In the Moore case, *supra,* the cause was not remanded because the defendant consented to the exercise of its powers by removing the case, and the plaintiff by amending its pleadings, and thereby invoking the jurisdiction of, the Federal Court. In the Harding case, *supra,* the decision turned upon the propriety of the petitioner's remedy, and the Court never came to the question of whether the case was, or was not, properly removed. It, however, reviewed and modified in some respects the Wisner and Moore cases, and it must be assumed that if it had dissented from the doctrine of those cases as to the right of removel there would have been some intimation of that fact. In the Park Square Automobile Station case the motion to remand was based upon the ground that as the suit was begun in a New Hampshire State Court it should have been removed to the Federal Court in that State, and not to the Federal Court in New York, because the defendant resided there. The decision was rested upon the ground that a mandamus was not a proper remedy, and the Court never came to consider whether the case could, or could not, have been rightfully remanded, but discussed and approved the Harding and Roe cases which it could not have done if it had disapproved the conclusion announced in the Wisner and Moore cases.

JUDGE WADDILL'S OPINION.

Judge Waddill has been a United States Judge for twenty years, and the official reports show, we think, that during that time he has been called upon to hear and determine as large a number of important cases as any of his associates on the Federal Bench, and that no one of them has been affirmed in a greater percentage of cases, although very numerous appeals have been taken from Judge Waddill's decisions be-

cause of the large amounts and difficult questions involved in the cases decided by him. His opinion is the most recent announcement on the point at issue. It was evidently written after careful study of the authorities, and is entitled to great weight, and should prevail, in the absence of convincing authority or reasoning to the contrary. We submit that there is a total absence of both in the brief in support of the petition.

PETITIONER'S BRIEF.

It may be we should reply in detail to petitioner's brief, and criticise at length the cases to which reference is made, but it seems to us not worth while to do so for the obvious reason that, as to the remedy, the petitioner is proceeding merely upon an assumption, not only unsupported by authority, but in plain, unequivocal, conflict with the often expressed views of this Court, and, as to the merits, only upon the theory that because there has heretofore been some difference of opinion upon the part of the several District Judges, this Court should restate what it has heretofore said, in the face of the fact that Congress has now seen fit to make the action of the trial Courts in respect to the remanding of cases final, and not reviewable by appeal, certiorari, mandamus, or any other means. Moreover, we are unable to gather from the brief any clear idea of the grounds upon which the petitioner thinks it has a right either to the remedy, or the relief, sought. There is an indiscriminate citation of cases bearing upon sections of the statute totally unlike those under review, such, for example, as the reference to *In the Matter of Tobin,* 214 U. S. 506, and *In the Matter of Athanasi Nicola,* 218 U. S. 668. These cases arose out of the clauses of the statute dealing with the rights of aliens. Many other cases are cited, but they seem to us no more in point than those mentioned. The brief contains many such statements as

"A logical application of the doctrine of Ex Parte Wisner, *Supra,* would prevent the removal of all such causes contrary to the permissive provisions of Section 28 of the Code.

"* * * * * * * The construction of the removal statute in Wisner, *Supra,* effects inconsistencies resulting in inconveniences and injustice."

We confess ourselves unable to answer these, and like, statements, because it seems to us it would be moving in a circle to attempt to trace their relationship to the points at issue.

CONCLUSION.

It is beyond question, we submit, that the petitioner is entitled to no relief, and that if the contrary were the case it has invoked the wrong remedy; that the petition is wholly without merit, and that it, together with all proceedings had thereon, should be summarily dismissed.

Respectfully submitted,
SWINK & FENTRESS
and
BAIRD, WHITE & LANNING,
Counsel for Respondent.

GILBERT R. SWINK,
EDWARD R. BAIRD, JR.,
Advocates.

EX PARTE IN THE MATTER OF MATTHEW ADDY STEAMSHIP & COMMERCE CORPORATION, PETITIONER.

PETITION FOR WRIT OF MANDAMUS.

No. 30, Original. Argued April 11, 1921.—Decided May 16, 1921.

An order of the District Court remanding a case to the state court can not be reviewed by this court by mandamus. P. 418. Jud. Code, § 28.

Rule discharged; petition dismissed.

THE case is stated in the opinion.

Mr. T. K. Schmuck, with whom *Mr. Nelson B. Cramer* was on the briefs, for petitioner.

Mr. Edward R. Baird, Jr., and *Mr. Gilbert R. Swink* for respondent.

MR. JUSTICE CLARKE delivered the opinion of the court.

The Coalmont Moshannon Coal Company, a Pennsylvania corporation, filed its petition in the Circuit Court of the City of Norfolk, Virginia, against the petitioner, Matthew Addy Steamship & Commerce Corporation, a Delaware company, for the recovery of damages for the alleged breach of a contract, and, under Virginia practice, garnisheed other defendants. In due time, and in proper form, the defendant, the petitioner herein, filed its petition for the removal of the case to the District Court of the United States for the Eastern District of Virginia. Thereafter the plaintiff in the state court filed a motion to remand the case, claiming that it was not removable for the reason that the plaintiff and the principal defendant

were non-residents of the Eastern District of Virginia. The District Court sustained this motion and ordered the case remanded to the state court.

The petition in this proceeding prays that a writ of mandamus shall be issued, directing the District Judge for the Eastern District of Virginia, to vacate the order remanding the case, to redocket it in the District Court, and that it thereupon be heard and determined according to law. A rule to show cause was issued and the judge has filed his return, in which he asserts that the petition should be dismissed, for the reason that mandamus is not an appropriate remedy, because not permitted by the provisions of § 28 of the Judicial Code, reading as follows:

"Sec. 28. . . . Whenever any cause shall be removed from any State court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed."

This language of the Judicial Code first appeared in the Act of Congress of March 3, 1887, c. 373, 24 Stat. 552, as reënacted on August 13, 1888, c. 866, 25 Stat. 433, and it has continued unchanged except by the substitution of the District for the Circuit Court.

In 1890, in the case of *In re Pennsylvania Co.*, 137 U. S. 451, it was held that the power which this court had before the passage of the acts, *supra*, to afford a remedy by mandamus when a cause, removed from a state court was improperly remanded thereto, was taken away by these acts. Upon full consideration of the prior legislation, this court in the opinion in that case said of the language of the statute quoted, p. 454:

"In terms, it only abolishes appeals and writs of error, it is true, and does not mention writs of mandamus; and

it is unquestionably a general rule, that the abrogation of one remedy does not affect another. But in this case, we think it was the intention of Congress to make the judgment of the Circuit Court remanding a cause to the state court final and conclusive. The general object of the act is to contract the jurisdiction of the federal courts. The abrogation of the writ of error and appeal would have had little effect in putting an end to the question of removal, if the writ of mandamus could still have been sued out in this court. It is true that the general supervisory power of this court over inferior jurisdictions is of great moment in a public point of view, and should not, upon light grounds, be deemed to be taken away in any case. Still, although the writ of mandamus is not mentioned in the section, yet the use of the words 'such remand shall be immediately carried into execution,' in addition to the prohibition of appeal and writ of error, is strongly indicative of an intent to suppress further prolongation of the controversy by whatever process. We are, therefore, of opinion that the act has the effect of taking away the remedy by mandamus as well as that of appeal and writ of error."

In *Fisk* v. *Henarie*, 142 U. S. 459, 468, *In re Pennsylvania Co.*, *supra*, was cited as authority for the declaration that "review on writ of error or appeal, or by mandamus is taken away" by the statutes cited.

In *Missouri Pacific Ry. Co.* v. *Fitzgerald*, 160 U. S. 556, 581, this court said: "It was subsequently decided in the case of *In re Pennsylvania Co.*, 137 U. S. 451, 454, that the power to afford a remedy by mandamus when a cause, removed from a state court, is improperly remanded, was taken away by the Acts of March 3, 1887, and August 13, 1888."

In *Powers* v. *Chesapeake & Ohio Ry. Co.*, 169 U. S. 92, 98, it was said that an order remanding a case such as we have here "is not reviewable by this court."

In *McLaughlin Brothers* v. *Hallowell*, 228 U. S. 278, it is held that an order of the United States Circuit Court, remanding a case to a state court, is not reviewable here, directly or indirectly, citing *Missouri Pacific Ry. Co.* v. *Fitzgerald*, 160 U. S. 556.

It is obvious that this statute, and these decisions interpreting it, rule the case at bar and require that the petition for mandamus be dismissed.

It is not important to inquire to what extent, if at all, *Ex parte Wisner*, 203 U. S. 449, and *In re Moore*, 209 U. S. 490, departed from the statute and decisions cited, for the correct rule with respect to the function and use of the writ of mandamus has been so often announced in other later cases that it has become entirely settled. *Ex parte Harding*, 219 U. S. 363; *McLaughlin Brothers* v. *Hallowell*, 228 U. S. 278; *Ex parte Roe*, 234 U. S. 70; *Pacific Live Stock Co.* v. *Lewis*, 241 U. S. 440, 447; *Ex parte Park Square Automobile Station*, 244 U. S. 412; *Ex parte Park & Tilford*, 245 U. S. 82.

The conflict of opinion in the lower courts with respect to the right of removal from a state court of a case in which the opposing parties are citizens of different States and neither is a resident of the State in which the case is commenced, is much to be regretted, but § 28 of the Judicial Code is controlling, and Congress alone has power to afford relief.

Rule discharged.
Petition dismissed.